TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 681

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, ET AL., APPELLANTS,

vs.

UNITED STATES, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

FILED JANUARY 27, 1961
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INDEX

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[fol. 1] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Civil Action No. 20575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

COMPLAINT TO SUSPEND, ENJOIN, ANNUL, AND SET ASIDE AN ORDER OF THE INTERSTATE COMMERCE COMMISSION—Filed October 7, 1960

Comes now the Brotherhood of Maintenance of Way Employes, a voluntary association, the plaintiff herein, for its cause of action against defendants, United States of America and Interstate Commerce Commission, complains and alleges as follows:

I

Jurisdictional Statement

1. This action is brought to suspend, annul, enjoin, and set aside an order of the Interstate Commerce Commission dated September 13, 1960, and issued on September 15, 1960, to be effective October 17, 1960, in an administrative proceeding before that Commission designated as "*Erie Railroad Company—Merger, etc.—Delaware, Lackawanna & Western Railroad Company.*" Finance Docket No. 20707. A copy of the said order and the accompanying report of the Commission, made a part thereof, are attached hereto as Appendix A and are made a part hereof. This action arises under Sections 5(2) and 17 of the Interstate Commerce Act (49 U.S.C. 5(2) and 17).

2. The jurisdiction and venue of this Court to hear the complaint and grant the relief requested herein are established by Sections 1336, 1398, 2284, and 2321 through 2325 of the Judicial Code (29 U.S.C. Sections 1336, 1398, 2284, 2321-2325) and Section 10 of the Administrative Procedures Act (5 U.S.C. § 1009). These provisions include [fol. 2] the requirement of a 3-judge court to hear and determine the action.

II

Parties

3. The plaintiff is a voluntary unincorporated association.

4. The headquarters of plaintiff are located at 12050 Woodward Avenue, Detroit 3, Michigan.

5. Plaintiff is the duly designated collective bargaining representative under the Railway Labor Act for certain employees of the Erie Railroad Company and the Delaware, Lackawanna & Western Railroad Company, in the Maintenance of Way Department of said railroads and has agreements with said railroad carriers concerning rates of pay, rules and working conditions of such employees. Said agreements confer upon such employees valuable property rights in relation to their employment. By virtue of the foregoing the plaintiff represents the interest of said employees and this action is brought on their behalf as well as on behalf of plaintiff.

6. The plaintiff through its chief executive officer is a member of the Railway Labor Executives' Association, a voluntary unincorporated association with which are affiliated the chief executive officers of the Railway Employes' Department, AFL-CIO, and 21 standard national and international railway labor organizations. The Railway Labor Executives' Association was an intervening party before the Interstate Commerce Commission in Finance Docket No. 20707 and represented the interests of employees of the Erie Railroad Company and the Delaware, Lackawanna & Western Railroad Company represented

by plaintiff in this action as well as the interests of employees of those railroads represented by the other standard national and international railway labor organizations.

7. The United States of America is made a defendant in this complaint pursuant to the provision in Section 2322 of Title 28 of the United States Code.

[fol. 3] III

Nature of the Case

8. The Erie Railroad Company and the Delaware, Lackawanna & Western Railroad Company filed with the Interstate Commerce Commission an application under Section 5(2) of the Interstate Commerce Act (49 U.S.C. 5(2)) for authority to merge the properties and franchises, including motor carrier operating rights, of the Delaware, Lackawanna & Western Railroad Company into the Erie Railroad Company for ownership, management, and operation; the acquisition by the latter of sole or joint control, through ownership of stock of railroad carriers subsidiary to or affiliated with the former; and acquisition of trackage rights by the Erie Railroad Company, as successor in interest, over the line of the Pennsylvania Railroad now used by the Delaware, Lackawanna & Western Railroad; and for other incidental relief. This application resulted in the report and order of the Commission referred to in Paragraph 1 above, which grants the application as requested subject to certain conditions. As a result of this order the railroad carriers are authorized to undertake operations on October 17, 1960, which will result in the abolishment of almost 2,000 jobs and the transfer of another 2,000 jobs over a period of five years from the effective date of the order.

9. The Railway Labor Executives' Association, representing the chief executive officer of plaintiff, and the chief executive officers of other railway labor unions, intervened in the proceeding before the Commission in opposition to the granting of the application and for the purpose of receiving the protection of employees required by Section 5(2) of the Interstate Commerce Act. Subparagraph (f)

of Section 5(2), particularly the second sentence thereof, specifically prohibits the Interstate Commerce Commission from approving any transaction pursuant to the provisions of Section 5(2) unless it provides as a condition to said approval "that during the period of four years from the effective date of such order such transaction would not result in employees of the Erie Railroad Company and the Delaware, Lackawanna & Western Railroad Com-[fol. 4] pany being placed in a worse position with respect to their employment than they were prior thereto.

10. The provision of law governing the authority of the Commission in proceedings arising under Section 5(2) reads as follows:

> "Sec. 5(2)(f). As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall *include terms and conditions providing that during a period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment*, except that the protection afforded to any employee pursuant to this section shall not be required to continue for longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order." (Emphasis supplied.)

11. In its order dated September 13, 1960, served September 15, 1960, and effective October 17, 1960, in Finance Docket No. 20707, the Interstate Commerce Commission failed and refused to impose conditions which would prevent employees from being placed in a worse position with respect to their employment and imposed instead conditions which provide the employees compensation in lieu

of employment, contrary to the express provisions above quoted of Section 5(2)(f).

12. As a result of the Commission's order herein many employees of the Erie Railroad Company and the Delaware, Lackawanna & Western Railroad Company represented by plaintiff will suffer irreparable injury through permanent loss of seniority and employment rights with those railroads in violation of the requirements of Section 5(2)(f).

IV

Irreparable Injury to Employees

13. The railroad applicants before the Commission submitted an exhibit, No. H-48, in which their opinion as to the effect of the merger on all employees over a 5-year period was set forth. It was estimated that during the first year following the effective date of the merger 403 jobs in all categories would be abolished; and 430 jobs would be transferred. The merged railroad, therefore, im-[fol. 5] mediately upon the effective date of the Commission's order approving the merger, can and undoubtedly will proceed to abolish jobs and transfer jobs. As soon as the first job is abolished or transferred the seniority rights of the employees involved will be exercised and a process of displacement of junior employees by senior employees will commence. This process will start with the most senior man affected and continue down through the roster of employees until it reaches the youngest man, seniority-wise, in the employ of the railroads who will be deprived of his employment. The conditions imposed by the Commission require that certain monetary allowances be paid to employees deprived of their employment or placed in lower paying jobs. The second sentence of Section 5(2)(f) requires the Commission to prevent deprivation of employment. If the merger is allowed to proceed pending final disposition of this complaint the employees who will have been affected by the time the issue is finally determined will be irreparably injured in that their right to employment in no worse position than that which they enjoyed

prior to the merge will be irretrievably lost. The Commission, the railroads, and the courts would be powerless to turn back the clock, reverse the bumping process, recreate jobs which had been abolished, relocate employees who had been transferred and reemploy employees who had been deprived of their employment. Unscrambling the employment problem in the event of a determination setting aside the Commission order in this case would be a practical impossibility. Attached hereto and made a part hereof as Appendix C to this complaint is the affidavit of Raymond A. Flanagan which more particularly set forth the irreparable injury which will result to employees if the order of the Interstate Commerce Commission is not stayed pending disposition of this complaint. On the other hand any loss to the railroad occasioned by the issuance of a temporary restraining order will be relatively minor and temporary.

[fol. 6]

V

Allegations of Error

14. The report and order of the Interstate Commerce Commission decided September 13, 1960, served September 15, 1960, and effective October 17, 1960, referred to above is illegal and void for the following reasons:

(a) The order erroneously and illegally exceeds the statutory power of the Commission by approving a merger under Section 5(2) of the Interstate Commerce Act without abiding by the essential prerequisite to such approval set forth in the second sentence of Subparagraph (f) of Section 5(2).

(b) The report and order of the Interstate Commerce Commission referred to above erroneously interprets the second sentence of Section 5(2)(f) by viewing the language of that sentence as if it read "in a worse position with respect to their compensation" rather than "in a worse position with respect to their employment" which is its exact and precise language.

(c) The Commission erred in ignoring the plain language of the statute and the very thorough and unequivocal explanation found in the Congressional Record of the meaning of the second sentence of Section 5(2)(f) by the author of that sentence, Representative Harrington, and other legislators.

(d) The Commission erred in relying upon its decisions in cases decided prior to its decision in Finance Docket No. 20707 which imposed compensatory protection for employees under Section 5(2)(f) since those decisions did not hold that Section 5(2)(f) did not require additional protection for employees nor was the issue raised before the Commission in Finance Docket No. 20707 raised in those cases.

(e) The Commission erred in failing to follow the interpretation placed upon this provision of law by the language of the United States Supreme Court found in two separate decisions.

(f) The Commission erred in concluding that the imposition of conditions in accordance with the mandate of the second sentence of Section 5(2)(f) would not be consistent with the public interest because "conditions calculated to [fol. 7] preserve unneeded jobs would unduly restrict the applicants in the establishment of most economical operations, would be wasteful, and would be in conflict with the objectives of the National Transportation Policy, under which we are enjoined to promote economical and efficient service and to foster sound economic conditions in transportation and among the several carriers." Such a finding has absolutely no basis in the record nor in the report itself.

(g) The Commission erred, not only in ignoring the many concise and explicit statements of the author of the legislation in question, but in misinterpreting the language of other members of the House which it quoted in its report.

15. The report and order of the Interstate Commerce Commission referred to in Paragraph 1 above, are, in the particulars set forth in Paragraph 14, based on an erro-

neous, improper and illegal construction of the Interstate Commerce Act, as amended, and are contrary to the requirements of Section 5(2)(f) of that Act, in excess of the Commission's statutory powers, and constitute an abuse of the Commission's authority and discretion.

16. Plaintiff and the employees it represents have fully pursued their administrative remedies before the Commission since the order herein complained of is the order of the entire Commission and the pro forma filing of a petition for reconsideration would be a futility. Plaintiff and those represented by it have no remedy in the premises at law, by action for damages or otherwise, save by complaint to this Court pursuant to the provisions of the Judicial Code as aforestated.

VI

Prayer for Relief

Wherefore, plaintiff respectfully prays:

First: That in accordance with the provisions of Section 2284 of Title 28 of the United States Code, this Court immediately notify the Chief Judge of the United States Court of Appeals for the Sixth Circuit who shall designate two other Judges, at least one of whom shall be a Circuit Judge, to serve as members of a 3-judge court to herein determine this action.

[fol. 8] Second: That process issue against the defendants, United States of America and Interstate Commerce Commission; that service of a copy of the complaint be made upon the Attorney General of the United States, the United States Attorney for the Eastern District of Michigan, and the Interstate Commerce Commission; and that after answer by the defendants and after not less than 5 days' notice to the parties the application herein be given precedence and assigned for hearing at the earliest practicable day as provided by Section 2284 of Title 28 of the United States Code.

Third: That an interlocutory injunction shall issue herein after due notice of this application therefor and that

defendants be ordered upon a date fixed to show cause why said interlocutory injunction should not be granted; that meanwhile, and until the hearing and determination of the application for an interlocutory injunction as aforesaid, a temporary restraining order issue, as provided in Section 2284(3) of Title 28 of the United States Code, to prevent immediate, great and irreparable injury, loss and damage to the employees of the above-named railroads which will result as aforesaid before notice can be served and a hearing had upon the application for an interlocutory injunction, restraining the said defendants from placing into effect or operation the order of the Interstate Commerce Commission dated September 13, 1960, served on September 15, 1960, and effective October 17, 1960.

Fourth: That upon hearing of this action, a judgment issue annulling and setting aside as unlawful and void the challenged order of the Interstate Commerce Commission above described, and enjoining the Commission from approving the merger of the above-named railroads without complying with Subparagraph (f) of Section 5(2) of the Interstate Commerce Act;

Fifth: That the plaintiff be given such other, further, general, and different relief as the nature of the case may require and the Court may deem just and proper.

Respectfully submitted,

George E. Brand, George E. Brand, Jr., 3709-23 Cadillac Tower, Detroit 26, Michigan.

[fol. 9] William G. Mahoney, 620 Tower Building, Washington 5, D. C.

Attorneys for plaintiff Brotherhood of Maintenance of Way Employes.

[fol. 10]

APPENDIX "A" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 20707

ERIE RAILROAD COMPANY—MERGER, ETC.—DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY

Decided September 13, 1960—Date of Service September 15, 1960

1. (a) Merger of the properties and franchises, including motor carrier operating rights, of The Delaware, Lackawanna and Western Railroad Company into the Erie Railroad Company for ownership, management, and operation, (b) acquisition by the latter of sole or joint control, through ownership of stock of railroad carriers subsidiary to or affiliated with the former, and (c) acquisition of trackage rights by the Erie Railroad Company, as successor in interest, over the line of the Pennsylvania Railroad now used by The Delaware, Lackawanna and Western Railroad Company, approved and authorized. Conditions prescribed.

2. Authority granted to Erie Railroad Company to issue shares of Erie-Lackawanna Railroad Company common stock without par value and scrip certificates representing fractional shares in conversion of outstanding capital stock of the Erie Railroad Company and The Delaware, Lackawanna and Western Railroad Company and pursuant to restricted stock options of the latter; and to assume obligations and liabilities of The Delaware, Lackawanna and Western Railroad Company under its outstanding mortgage bonds and its other securities; all in connection with the merger. Conditions prescribed. That portion of the application which seeks authority under section 20a to assume obligation and

liability in respect of conditional sales contracts dismissed for want of jurisdiction.

3. Certificate issued (a) permitting abandonment of portions of the lines of railroad of the Erie Railroad Company and The Delaware, Lackawanna and Western Railroad Company in Erie, Broome and Steuben Counties, N.Y., and Susquehanna and Lackawanna Counties, Pa.; and (b) authorizing construction of connecting lines of railroad and extensions of lines in Erie and Steuben Counties, N.Y., Susquehanna County, Pa., and Hudson County, N.J. Conditions prescribed.

M. C. Smith, Jr., Edward W. Bourne, Frederick G. Hoffman, Thomas D. Caine, Rowland L. Davis, Jr., Leonard D. Adkins, James F. Mulligan and Walter J. Cummings, Jr., for applicants.

Andrew P. Martin, R. G. Bleakney, Jr., John D. Morrison, Robert D. Brooks, Eugene M. Smith, Thomas O. Broker, James B. Osborne, John L. Davidson, Jr., Eugene S. Davis, Lawrence Berman, William Q. Keenan, J. Raymond Hoover, and Dickson R. Loos for intervening railroad carriers.

[fol. 11] H. R. Begley for the State of Illinois and Robert R. Welborn for the State of Missouri.

Charles P. Knapp, Robert M. Wightman, Robert J. McDowell, Ernest G. Peltz, Joseph Harrison, and A. P. Kaufmann for communities and civic organizations.

Arnold L. Fein for dissenting stockholders.

William G. Mahoney and Sam Del Grosso for organizations of railway employees.

Report of the Commission

By the Commission:

Exceptions to the report recommended by the hearing examiner were filed by the Railway Labor Executives Association (the association); the Cohocton Valley Committee, a group of dissenting stockholders of The Delaware, Lackawanna and Western Railroad Company (dissenting stock-

holders); The New York Central Railroad Company (New York Central); The New York, Chicago and St. Louis Railroad Company (Nickel Plate); and the Grand Trunk Western Railroad Company (Grand Trunk). The applicants replied and the case has been argued orally.

The Erie Railroad Company (Erie) and The Delaware, Lackawanna and Western Railroad Company (Lackawanna), common carriers by railroad subject to part I of the Interstate Commerce Act, by application filed July 6, 1959, as amended, seek authority (1) under section 5(2) of the Interstate Commerce Act (a) to merge the properties and franchises of the Lackawanna into the Erie, (b) for Erie, through ownership of stock, to acquire sole or joint control of carriers subsidiary to or affiliated with the Lackawanna, and (c) for Erie, (as successor in interest) to acquire trackage rights over lines of the Pennsylvania Railroad now used by the Lackawanna; (2) under section 20a, for Erie to issue capital stock and to assume obligations and liabilities of the Lackawanna under its outstanding mortgage bonds and other securities; and (3) under section 1(18)-(20), for a certificate of public convenience [fol. 12] and necessity permitting abandonment of certain segments of lines of railroad of the Erie and the Lackawanna, and authorizing construction by the surviving company of certain connecting tracks and extensions of the lines of railroad of the applicants. Extensive hearings have been held.

The terms of the proposed transactions, a description of the applicant carriers, the positions of the parties, and pertinent facts in regard to the transactions are set forth in the examiner's report, and will be repeated only to the extent necessary for clarity in our discussion of exceptions. We agree with the examiner's findings of facts and conclusions and, with some supplementation herein, they are adopted as our own.

Upon consummation of the merger, the separate corporate existence of Lackawanna will cease and the name of Erie, the surviving corporation, will be changed to Erie-Lackawanna Railroad Company, hereinafter sometimes referred to as the unified company.

Among the properties and franchises to be merged with Erie is Lackawanna's authority under certificates issued by us in Nos. MC 103516 and MC 103516, Subs 2, 3, 4, and 5, to perform service as a common carrier by motor vehicle auxiliary to, or supplemental of, its rail service, between stations on its line of railroad in New Jersey, New York, and Pennsylvania. An application is also pending in No. MC 103516, Sub 7, for Lackawanna to provide substituted motor-carrier service to additional points in New York and Pennsylvania. Erie holds authority under certificates in Nos. MC 101010, Subs 2 and 8, to perform substituted [fol. 13] motor-carrier service between certain points on its line of railroad in New York, Pennsylvania, and Ohio. It also has an application pending in No. MC 101010, Sub 10, for authority to perform substituted service between certain points on its line in Pennsylvania by means of highway trailers moving on through rail bills of lading which have had or will have a prior or subsequent movement in rail "piggyback" service. If the merger is consummated, it is assumed that the unified company will seek substitution of itself as applicant in the No. MC 103516, Sub 7, proceeding.

Exceptions of dissenting stockholders.—In their exceptions, the dissenting stockholders claim procedural errors were committed by the examiner in (a) denying requests for adjournments, (b) limiting cross-examination of applicants' witnesses, (c) denying cross-examination of applicants' witness Lewis G. Harriman, and (d) closing the hearing in the absence of counsel for the dissenting stockholders.

The instant application was filed July 6 and the hearing did not commence until September 29, 1959, almost 3 months later, and hearings were not completed until October 22, 1959. In our opinion, adequate time was afforded the stockholders for the preparation of their case, and adequate justification has not been shown for the adjournments requested. An examination of the record does not support the allegation that counsel was unduly limited in his cross-examination or that the examiner erred in closing the hearing in the absence of counsel, such absence being volun-

tary on his part and after the receipt of notice to appear. As to the witness Harriman (member of Lackawanna's board of managers, its executive committee, and the com-[fol. 14] mittee for negotiating the terms of the merger), we have disregarded his testimony. Accordingly, the motion to reconvene the hearing to permit cross-examination of this witness is overruled.

In addition to objections described above, the dissenting stockholders allege that the stock distribution proposed in connection with the merger will not be just and reasonable to Lackawanna stockholders. They contend that appropriate consideration has not been given to the relative book values of the stocks involved (Lackawanna $109.01 per share, Erie $68.90 per share), to the preemptive rights of Lackawanna's stockholders, their alleged cumulative rights of voting, and to the sale by Lackawanna of its holding of Nickel Plate stock.

The dissenting stockholders are correct in their contention that all of such matters are properly for consideration in determining the justness and reasonableness of the terms of the proposed merger, and such consideration has been given in arriving at our conclusion that the terms are just, reasonable, and fair to stockholders of each of the carriers involved. A more important element, however, in determining the reasonableness of the terms is the comparative earning power of the two carriers in relation to the shares of stock outstanding. The examiner's report contains a thorough analysis of the comparative earnings of the two carriers and of other pertinent factors properly for consideration in appraising the reasonableness of the proposed [fol. 15] stock distribution. The record is convincing that the terms are just and reasonable, and that approval thereof will be consistent with the decision of the United States Supreme Court in *Schwabacher* v. *United States*, 334 U.S. 182, as well as other pertinent court decisions cited by the dissenting stockholders in support of their position. Not to be overlooked in connection with this subject is that the terms were arrived at as a result of arms-length bargaining by representatives of the carriers involved and have received approval of a great majority of the stockholders of each.

Exceptions of Cohocton Valley Committee.—This committee took exception to the omission from the examiner's findings, and his recommended certificate and order, of any requirement that the applicants construct and install necessary industrial sidings and spur-track facilities in keeping with their declaration on the record that such would be done. The applicants, in their reply, state that they have no objection to our imposing a condition to our authorizations that necessary industrial sidings and spur-track facilities suitable to specific industries involved will be constructed at or near Coopers, Campbell, Bath, Savona, Avoca, Cohocton, and Wayland, N.Y., as referred to by the examiner. Our order will be so conditioned.

Exceptions of intervening railroad companies.—The examiner recommended the imposition of conditions for the maintenance of existing joint routes, interchange arrangements, switching practices, and solicitation restrictions, as follows:

1. Upon consummation of the merger, the Erie-Lackawanna Railroad Company shall maintain and keep open all routes and channels of trade via existing junctions and gateways, unless and until otherwise authorized by the Commission.

[fol. 16] 2. The present neutrality of handling traffic inbound and outbound by The Delaware, Lackawanna and Western Railroad Company shall be continued so as to permit equal opportunity for service to and from all lines reaching the rails of that carrier, without discrimination as to routing or movement of traffic and without discrimination in the arrangement of schedules or otherwise.

3. The present traffic and operating relationships existing between The Delaware, Lackawanna and Western Railroad Company, on the one hand, and all lines connecting with its tracks, on the other, shall be continued insofar as such matters are within the control of the Erie-Lackawanna Railroad Company.

4. The Erie-Lackawanna Railroad Company shall accept, handle, and deliver all cars inbound and outbound, loaded and empty, without discrimination in promptness or frequency of service as between cars destined to or received from competing carriers, and irrespective of destination or route of movement.

5. The Erie-Lackawanna Railroad Company shall not do anything to restrain or curtail the right of industries now located on The Delaware, Lackawanna and Western Railroad Company to route traffic over any or all existing routes and gateways.

6. Any party or any person having an interest in the subject matter may at any future time make application for such modification of the above conditions, or any of them, as may be required in the public interest, and jurisdiction will be retained to reopen the proceeding on our own motion for the same purpose.

The exceptions of New York Central, Nickel Plate, and Grand Trunk relate to the foregoing conditions. New York Central agrees with the applicants that greater efficiency and economy in railroad operations are desirable and states that it would appear that the proposed merger would make possible more efficient operation of the applicants' properties. However, it takes the position that there should be no automatic change in the through routes for Lackawanna's traffic with connecting carriers as a result of this merger and that, under the recommended conditions, Erie would supposedly be bound to maintain existing routes and channels of trade via existing gateways, but that under its proposed plan of tariff publication New York Central would not know what traffic was entitled to which routes. [fol. 17] New York Central requests that we specifically find that the recommended conditions require the continued identification of Lackawanna routes and stations in the tariffs of the unified company. It states that it identifies the various segments of its own system in its tariff and that the Norfolk and Western Railway Company, recently merged with The Virginian Railway Company, does like-

wise. New York Central has presented a set of conditions (which were considered by the examiner in arriving at his recommendation) that it believes would insure the desired results.

Nickel Plate has also presented a set of suggested conditions which, in its opinion, would require the unified company to afford to Nickel Plate the same or equal competitive service via Buffalo that it may establish by way of its route by-passing Buffalo. Nickel Plate represents that, by asking for such conditions, it is not asking for anything more than it now has, and also requests that, at its option, it have the benefit of any more favorable service, interchange arrangements, or use of facilities which the unified company may accord to any other connection at Buffalo, including the right to operate to the unified company's proposed new yard over the tracks of Lackawanna.

As the basis for its exceptions and its suggested conditions, Nickel Plate states that it anticipates the diversion of at least $3,647,000 in revenues from its system annually as a result of the proposed merger.

Grand Trunk, in its exceptions, requests that the conditions recommended by the examiner for the maintenance of existing joint routes, interchange arrangements, switch- [fol. 18] ing practices and solicitation restrictions be amended to include maintenance of both existing service and schedules.

The conditions recommended by the examiner have been imposed in a number of prior decisions under section 5 of the act. See *Detroit, T. & I. R. Co. Control,* 257 I.C.C. 455, *Louisville & N. R. Co. Merger,* 295 I.C.C. 457, and *Norfolk & W. Ry. Co. Merger,* 307 I.C.C. 401. In our opinion, the conditions recommended by the examiner, and hereby adopted by us, provide just and reasonable limitations upon the unified company's ability in the future unjustly to favor certain routes and gateways or to vary the degree of cooperation with certain or any of the interveners in regard to schedules, interchange of freight, and train departure arrangements. To the extent that any such changes in handling the traffic of the applicants would violate one or more of the first five of the conditions the inter-

veners would have a forum for proper relief; to the extent such activities of the unified company might not comply with the procedures governing the determination of rates, routes, and the routings of traffic, the interveners would have recourse to the remedies provided in section 15 of the act; and to the extent the other forms of relief would be inadequate, the interveners may invoke the sixth condition, and apply for our consideration of modification of the conditions as such may be required in the public interest. In *Wheeling & L. E. Ry. Co. Lease*, 271 I.C.C. 713, 746, Division 4, in disposing of a request for the imposition of conditions similar to those proposed by New York Central which would require the continued identification of Lackawanna's routes and stations and which New York Central asserts it voluntarily imposed upon its own system, stated:

> [fol. 19] Furthermore, we see no reason to require that the identity of the Wheeling be preserved for routing or billing purposes after operation has begun under the lease. The primary purpose of the transaction would thereby, at least to some extent, be defeated. The public interest will be served best by permitting a completely unified operation of the properties.

The same conclusion is warranted here with respect to Lackawanna.

In connection with transactions such as this, it is not practicable, nor would it be in the public interest, to impose conditions calculated to freeze the flow of traffic into a preexisting pattern or to protect competing and connecting carriers against all possible adverse effects which might follow from the unification and resulting improvements in service by the surviving corporation. Such action would prevent, to a substantial extent, the effectuation of service improvements to which the shipping public is entitled, and would unduly restrict the unified company in its solicitation and routing of traffic and the development of a strong competitive system. Particularly upon consideration of the financial condition and strength of the participants in the proposed merger, relative to the interveners generally, we

find no justification for more restrictive conditions than those recommended by the examiner. Such conditions are designed to maintain and keep open all routes and channels of trade via existing junctions and gateways, to preserve neutrality of handling traffic without discrimination, to protect traffic and operating relationships, to preserve the routing rights of shippers, and to keep open to all parties the right to return to this Commission for such modification or supplementation of the conditions as developments may show to be required in the public interest.

[fol. 20] It should be understood by the applicants that our reservation of jurisdiction embraces the power, upon our own motion or upon petition, to impose any or all of the conditions which have been requested by the interveners, if such action hereafter appears required by the public interest; and the exercise by the applicants of the authority herein granted will evidence their consent to our reservation of jurisdiction and an agreement by the unified company to grant such trackage rights to connecting railroads as we may find reasonably should be required because of the merger, upon such terms and conditions as we may find just and reasonable.

Exceptions of Railway Labor Executives' Association.—The association contends that section 5(2)(f) of the act requires the prescription of labor protective conditions adequate to assure the employment of all adversely affected employees for a minimum of 4 years after the effective date of the merger, rather than the providing of compensation in lieu of employment. The association states, on oral argument, that it has raised this issue for the first time in this proceeding because of the numerous merger cases pending, which, according to the association, if approved, would reduce railroad employment by more than 25 percent. It contends that since the only employees which will be affected by the merger are those, estimated by the applicants to be 863 in number, who would refuse to transfer their place of employment and who would have to transfer in order to obtain protection, if their employment were protected instead of their compensation, it would be to the advantage of the applicants if section 5(2)(f) of the act

were interpreted as requested by the association. The ap-
[fol. 21] plicants state that they have no knowledge of the specific cost of the conditions requested by the association and contend that, since the association's theory was advanced subsequent to the closing of the record herein, there is no necessity for their computing such cost.

Section 5(2)(f) requires us to condition our approval of mergers and other transactions between carriers so that these transactions "will not result in employees . . . being in a worse position with respect to their employment." An earlier sentence of the section provides that we "shall require a fair and equitable arrangement to protect the interests of the railroad employees affected." The section does not speak of employees in a worse position "in" their present employment, but in a worse position "with respect to" or in comparison with their present employment. It appears that compensation is intended by the very terms of the section to make certain that the employee's position as it relates to his livelihood is unharmed by the transaction between carriers.

Since 1941 we have uniformly interpreted section 5(2)(f) to permit either employment or compensation of employees displaced in consolidations of carriers. The first case was *Cleveland & Pittsburgh Railroad Company, et al. Purchase*, 244 I.C.C. 793 (1941), wherein we permitted the carriers the foregoing alternatives to the requirements of section 5(2)(f) (at 796). Later that year, we held in *Texas & P. Ry. Co. Operations*, 247 I.C.C. 285, 294-95 (1941) that our duty under section 5(2)(f) to provide "a fair and equitable arrangement" for the protection of employees is fulfilled if the essential arrangement is limited to displaced and dismissed employees. We also held that "compensation
[fol. 22] earned in any other employment by dismissed employees must be considered in determining whether they are in a 'worse position with respect to their employment.'"

In the next several years we approved other purchases and abandonments subject to compensation plans for displaced or dismissed employees. And, just as in the 1941 proceedings, the association acquiesced in this interpretation of the Commission's powers under section 5(2)(f). *Chicago, M., St. P. & P. R. Co. Trustees Construction*, 252

I.C.C. 49, 252 I.C.C. 287 (1942), 257 I.C.C. 292 (1944); *Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177, 198 *et seq.* (1944); *Chicago, R. & Q. R. Co. Abandonment*, 257 I.C.C. 700, 704 *et seq.* (1944).

The legislative history of section 5(2)(f) supports the interpretation that Congress did not intend to require us to maintain employees in their jobs. An amendment to accomplish this very objective was rejected by the Congress. The amendment ("Harrington Amendment") would have provided:

> Provided however, That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees.[1]

The present language of the section was approved after two conferences between the House and Senate. The second conference report, which contained the present language of the section, stated.

> In other words, the Harrington amendment made all employees of the affected carriers equal beneficiaries of its provisions regardless of the length of time they may have been employed prior to a consolidation. It also required the carrier to maintain the benefits of its provisions indefinitely and without any specified limitation by time or otherwise. Under the terms of [fol. 23] the conference agreement the benefits to employees will be required to be paid for not longer than 4 years after the consolidation, and in no case for longer than the service of the employee for the affected carriers prior to the effective date of the order authorizing the consolidation.[2]

The conferees clearly intended to require compensation, since in their words "benefits to employees will be required to be paid" for a certain period.

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[1] 84 Cong. Rec., Part 9, 76th Cong., 1st Sess., pages 9881-82.
[2] 86 Cong. Rec., Part 9, 76th Cong., 3d Sess., page 10167.

The subsequent discussion on the floor of the House confirms the interpretation put upon the language of the section by the second conference report. Representative Lea, one of the House managers, began the pertinent discussion:

> The substitute that we bring in here provides two additional things. First, there is a limitation on the operation of the Harrington amendment for 4 years from the effective date of the order of the Commission approving the consolidation. In other words, the employees have the protection against unemployment for 4 years, but the Commission is not required to give them benefits for any longer period. If the employees themselves make an agreement with the railroad company for a better or a longer period, that is a matter between the railroad men and the railroads, but this 4-year limitation is established by the pending conference agreement.
>
> There is another limitation on the protective benefits afforded by the amendment. The benefit period shall not be required for a longer period than the prior employment of the employee before the consolidation occurred. In other words, under the original Harrington amendment, if a man was employed for 6 months, he would indefinitely be subject to the benefits of the amendment from the railroad company. We have [fol. 24] changed that so the railroad company will not be required to maintain him in no worse condition as to his employment for any longer period than he worked before the consolidation occurred.
>
> We believe that is a very fair and a very liberal provision for labor. We believe that railway labor substantially agrees in that viewpoint. We take nothing from labor by this agreement. We simply write

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[3] *Id.* at 10178. The association dismisses the colloquy between Reps. O'Connor and Lea following Rep. Lea's introductory remarks since it was "made informally on the floor of the House," it "referred only to compensation," and was inconsistent with Rep. Lea's subsequent reiteration of the section's "full intent." Further remarks of the Congressman hereinafter reproduced indicate that the association's interpretation of this colloquy is strained.

specific provisions that shall be in the order of approval of the Commission, but otherwise we do not tie its hands.

Mr. Vorys of Ohio. Mr. Speaker, will the gentleman yield?

Mr. Lea. I yield to the gentleman from Ohio.

Mr. Vorys of Ohio. Would this 4-year rule have the effect of delaying a consolidation for 4 years, or would it mean that if a consolidation were made there would still be a 4-year period during which the man would be paid?

Mr. Lea. No; this rule does not delay consolidation. It means from the effective date of the order of the Commission the benefits are available for 4 years. The order determines the date, and the protective benefits run 4 years from that date.

Mr. Vorys of Ohio. That would be whether or not they were still employed?

Mr. Lea. Yes.

Mr. O'Connor. Mr. Speaker, will the gentleman yield?

Mr. Lea. I yield to the gentleman from Montana.

Mr. O'Connor. As I want to see those who might lose their jobs as a result of consolidation protected, I should like to have the gentleman's interpretation of the phrase that the employee will not be placed in a worse position with respect to this employment. Does "worse position" as used mean that his compensation will be just the same for a period of 4 years, assuming that he were employed for 4 years, as it would if no consolidation were effected?

Mr. Lea. I take that to be the correct interpretation of those words. Our conference agreement followed the instructions of the House in that respect. It gives railway labor generous protection against sudden and long unemployment.

Representative Halleck, another of the House managers, later added:

[fol. 25] As to the Harrington amendment, I do not know what the author of that amendment is going to

do about this bill, but I do know and understand that the people whose cause he so valiantly championed are not objecting to this provision as it is now written. It follows the principle of the so-called Washington agreement that was a contract entered into by the carriers with their employees to fix the rights of employees whose employment terminated upon consolidation. This language gives to the employees greater protection and more far-reaching protection and recognizes the principle to which we all subscribe, that rights of employees should be protected, and, beyond that, writes it into law.

Finally, Rep. Wolverton, also a House manager, stated that he thought the Harrington amendment had intended no more than compensation to employees facing dismissal, but that in any event compensation was now clearly intended:

> * * * It was recognized that the real intent of the (Harrington Amendment) sponsors was to save railroad employees from being suddenly thrust out of employment as the result of any consolidation or merger entered into. The Committee on Interstate and Foreign Commerce of this House in presenting its original bill used language which it thought accomplished that purpose. We thought we were giving legislative assurance of at least a continuance of the Washington agreement which had been previously entered into by the railroads and the 21 railroad brotherhoods. This agreement had furthermore been recognized and accepted by the Interstate Commerce Commission as a condition precedent for its approval in the Rock Island case, *United States* v. *Lowden*, (308 U.S. 225), and this action of the Commission has been affirmed by the Supreme Court of the United States in a suit attacking its validity. *We thought that the language we had used not only established this agreement for all succeeding cases of consolidation or merger* but that the language used would not preclude the Commission from improving upon the terms of that

agreement if necessary to provide equitable and fair treatment of employees affected by any consolidation or merger in the future. *Thus, it will be seen that there has been no difference in thought and desire between the committee and the sponsors of the Harrington amendment.* In fact the provision contained in the original bill had the approval of 20 out of the 21 railroad brotherhoods. And, it is significant in this connection that the one brotherhood which did not agree to our language had never asked for anything other than that the entire consolidation provision be left out of the bill and the matter be left at this time as a matter for collective bargaining. (Emphasis added).

* * * * * * * *

[fol. 26] * * * Nor should anyone overlook the fact that the adoption of this amendment as agreed to by the conferees gives railroad workers protection against sudden dismissal and *financial assistance* that is not enjoyed by workers in any other industry. And, this is true without any exception or qualification whatsoever. (Emphasis added).

Although there is no clear holding on the point, the courts, too, generally have favored the interpretation that section 5(2)(f) refers to compensation and not to a job-freeze. In *United States* v. *Lowden*, 308 U.S. 225 (1939), the Court read the House and Senate bills only recently passed relating to section 5(2)(f) as a Congressional declaration that "fair and equitable provision for the compensation of (employee) losses . . . promotes the national transportation policy" (at 238). It thought that the effect of the Congressional action was merely to make compensation schedules mandatory rather than permissive as they had been under section 5(4)(b) (at 239).

The *Lowden* opinion was explained in *Railway Labor Executives' Association* v. *U.S.*, 38 F. Supp. 818, 824 (D.C. 1941) as recognizing the right of "displaced personnel" to "share a part of the gain" resulting from consolidations. The District Court opinion was affirmed by the Supreme Court, 315 U.S. 373 (1942). In *R.L.E.A.* v. *U.S.*, 339 U.S. 142, 155 (1950), the Court characterized our practice as

affording employees "compensatory protection" and apparently thought it was consistent with the statute.

In our opinion, the association's newly asserted position that the act requires us to maintain railway employees in their jobs is incorrect and untenable. Assuming that we have the power to impose conditions like those requested by the association, in our opinion, such action would not be [fol. 27] consistent with the public interest. Conditions calculated to preserve unneeded jobs would unduly restrict the applicants in the establishment of most economical operations, would be wasteful, and would be in conflict with the objectives of the national transportation policy, under which we are enjoined to promote economical and efficient service and to foster sound economic conditions in transportation and among the several carriers. In our opinion, the conditions which we are imposing here, and have imposed in prior cases under section 5, afford reasonable protection to employees against financial losses which may result from transactions authorized under that section. Accordingly, we affirm the finding of the examiner in this respect and our authorizations herein will be made subject, by reference, to the employee protective conditions imposed in the *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271.

Conclusions.—Contentions of the parties herein as to either law or fact not specifically discussed have been given consideration and have been found to be without material significance or not justified.

The applicants request that, because of their critical financial condition, our certificate and order herein be made effective within 5 or 10 days of its service. We are of the opinion that this would not afford the interveners adequate time within which to take such steps as they deem warranted to protect their interests. Accordingly, our order will provide that it shall become effective 30 days after the date it is served.

We find that, subject to the specified conditions for the protection of adversely affected railway employees of the applicants, and the maintenance of existing joint routes, [fol. 28] interchange arrangements, switching practices,

and solicitation restrictions referred to hereinabove, (a) the merger of the properties and franchises of The Delaware, Lackawanna and Western Railroad Company into the Erie Railroad Company for ownership, management, and operation, (b) acquisition by the latter of sole or joint control, through ownership of stock of railroad carriers subsidiary to or affiliated with the former, and (c) acquisition of trackage rights by the Erie Railroad Company, as successor in interest, over the line of the Pennsylvania Railroad now jointly used by The Delaware, Lackawanna and Western Railroad Company, upon the terms and conditions set forth above, which terms and conditions are found to be just and reasonable, are transactions within the scope of section 5(2) of the Interstate Commerce Act, as amended, and will be consistent with the public interest, will enable the Erie Railroad Company to use service by motor vehicle to public advantage in its rail operations and will not unduly restrain competition; and that, if the transactions are consummated, the Erie Railroad Company will be entitled to operate under the operating rights granted in Nos. MC 103516 and MC 103516, Subs 2, 3, 4, and 5, which rights are herein authorized to be unified with rights otherwise confirmed in it and to be embraced in a certificate to be issued in its name, with duplications eliminated.

We further find, subject to the condition that, before issuing any of the stock herein authorized, the Erie Railroad Company shall file with this Commission a copy of the amendment to its certificate of incorporation duly certified by the appropriate public officer, providing for the changes in its stock, that (a) the proposed issue by the Erie Rail- [fol. 29] road Company of not exceeding 4,701,384-15/32 shares of common stock, without par value, and scrip certificates representing fractional interests therein, of Erie-Lackawanna Railroad Company, not exceeding 49,200 shares of common stock, without par value, of Erie-Lackawanna Railroad, to be sold at $21.3125 a share to satisfy existing stock options granted under The Delaware, Lackawanna and Western Railroad Company's restricted stock option plan, and the issue to holders of Erie Railroad Company preferred stock, series A and B, of new certificates of Erie-Lackawanna Railroad Company on a share-

for-share basis; (b) the proposed assumption by it of obligation and liability in respect of the outstanding securities of The Delaware, Lackawanna and Western Railroad Company, including obligation and liability in respect of the payment of principal and interest on $121,368,950 of mortgage and other funded obligations and $19,165,000 of equipment trust obligations of The Delaware, Lackawanna and Western Railroad Company, all in connection with the proposed merger, as aforesaid, are for lawful objects within its corporate purposes and compatible with the public interest, which are necessary and appropriate for and consistent with the proper performance by it of service to the public as a common carrier, and which will not impair its ability to perform that service, and are reasonably necessary and appropriate for such purposes.

We further find that so much of the application herein which seeks authority under section 20a to assume obligation and liability under the joint agreement of merger, in respect of conditional sales contracts, should be dismissed for want of jurisdiction. *Lehigh Valley R. Co., Conditional Sale Contract*, 233 I.C.C. 359.

[fol. 30] We find further that, subject to the conditions for the protection of railway employees and for the construction of industrial side-tracks and facilities referred to, the present and future public convenience and necessity (a) permit abandonment of portions of the lines of railroad of the Erie Railroad Company and The Delaware, Lackawanna and Western Railroad Company in Erie, Broome, and Steuben Counties, N.Y., and Susquehanna and Lackawanna Counties, Pa., and (b) require construction of connecting lines of railroad and extensions of the applicants' respective lines in Erie and Steuben Counties, N.Y., Susquehanna County, Pa., and Hudson County, N.J., as described herein.

An appropriate order and certificate will be entered.

Commissioner McPherson did not participate.

[fol. 31] Certificate and Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 13th day of September, A. D. 1960.

Finance Docket No. 20707

ERIE RAILROAD COMPANY—MERGER, ETC.—DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY

Investigation of the matters and things involved in this proceeding having been made, a hearing having been held, and the Commission, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the motion of the dissenting stockholders to reconvene the hearing to permit conclusion of cross examination and presentation of evidence by the said dissenting stockholders if they so desire, be, and it is hereby, overruled;

It is further ordered, That, subject to the conditions described and referred to in the aforesaid report, (a) merger of the properties and franchises of The Delaware, Lackawanna and Western Railroad Company into the Erie Railroad Company for ownership, management, and operation, (b) acquisition by the latter of sole or joint control through ownership of stock of the railroad carriers subsidiary to or affiliated with the former, and (c) acquisition of trackage rights by the Erie Railroad Company, as successor in interest, over the line of the Pennsylvania Railroad now jointly used by The Delaware, Lackawanna and Western Railroad Company, in the manner and upon the terms and conditions described in the aforesaid report found just and reasonable, be, and they are hereby, approved and authorized;

It is further ordered, That, subject to the condition in the aforesaid report regarding the amendment of its charter, the Erie Railroad Company be, and it is hereby, authorized (a) to issue not exceeding 4,701,384-15/32 shares of Erie-Lackawanna Railroad Company common stock without par value, and scrip certificates representing fractional interests in such stock, in conversion of 2,450,090 outstanding and 118⅜ reserved for issuance shares of common stock, without par value, of Erie Railroad Company, on a 1¼-for-1 basis, and 1,638,624 shares of common stock, without par value, of The Delaware, Lackawanna and Western Railroad Company, on a share-for-share basis, (b) to issue not exceeding 49,200 shares of common stock without par value, of Erie-Lackawanna Railroad Company, to be sold at $21.3125 each to satisfy existing options granted under The Delaware, Lackawanna and Western Railroad Company's restricted stock option plan, (c) to issue to holders of its preferred stock, series A and series B, at the option of the holder, a new Erie-Lackawanna Railroad Company certificate or certificates on a share-for-share basis, bearing certain information as to the voting powers of each class of stock which said company is authorized to issue, and (d) to assume obligation and liability in respect of "securities," as defined in section 20a(2) of the Interstate Commerce Act, of The Delaware, Lacka- [fol. 32] wanna and Western Railroad Company, including obligation and liabilities in respect of the payment of the principal and interest or dividends on mortgage and other funded obligations of which (as of March 31, 1959) there were outstanding or held in its treasury $121,368,950 of mortgage obligations, and $19,163,000 of equipment-trust obligations, all in connection with the merger hereinabove approved and authorized;

It is further ordered, That, except as herein authorized, said securities shall not be sold, pledged, repledged, or otherwise disposed of by Erie Railroad Company, unless or until so ordered or approved by this Commission;

It is further ordered, That Erie Railroad Company shall report concerning the matters herein involved in conformity

with the order of the Commission, by Division 4, dated August 9, 1946, as amended, respecting applications filed under section 20a of the Interstate Commerce Act (49 CFR 56.4 and 56.6);

It is further ordered, That the portion of the application which seeks authority under section 20a to assume obligation and liability, under the joint agreement of merger, in respect of conditional sales contracts, be, and it is hereby, dismissed;

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said securities, or interest or dividends thereon, on the part of the United States;

It is further ordered, That, if the parties to the transaction herein authorized desire to consummate same, they shall (1) promptly take such steps as will insure compliance with sections 215, 217, and 221(c) of the Interstate Commerce Act, and with rules, regulations, and requirements prescribed thereunder, and (2) confirm in writing to the Commission, immediately after consummation, the date on which consummation has actually taken place;

It is hereby certified, That, subject to the conditions for the protection of affected railway employees and the construction of industrial sidings and spur track facilities referred to in the aforesaid report, and contingent upon the merger transaction approved and authorized herein being consummated, the present and future public convenience and necessity (a) permit abandonment of portions of the lines of railroad of the Erie Railroad Company and The Delaware, Lackawanna and Western Railroad Company in Erie, Broome, and Steuben Counties, N.Y., and Susquehanna and Lackawanna Counties, Pa., and (b) require construction of connecting lines of railroad and extensions of the applicants' respective lines in Erie and Steuben Counties, N.Y., Susquehanna County, Pa., and Hudson County, N.J., described in the report of the hearing examiner; *Provided, however*, and this certificate is issued upon the express condition, that the construction authorized

shall be commenced on or before March 31, 1961, and be completed on or before December 31, 1961;

It is further ordered, That the Erie Railroad Company shall report in writing the commencement and completion of the lines of railroad authorized to be constructed, within 15 days after such commencement and completion, respectively;

It is further ordered, That the applicants when making such changes in tariffs as may be required, may do so upon notice to this Commission and to the general public by not [fol. 33] less than 10 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and shall in schedules making such changes refer to this certificate and order by date and docket number;

It is further ordered, That if the authority herein granted is exercised, the applicants shall submit for the consideration and approval of the Commission three copies of the journal entries required to record the transactions authorized herein;

It is further ordered, That the jurisdiction of this Commission be, and it is hereby, retained for the purpose of making such further order or orders herein as hereafter may be necessary or appropriate;

It is further ordered, That this certificate and order shall become effective from and after 30 days from the date of its service; and

It is further ordered, That, if the authority granted in the certificate herein is not exercised within two years from the date of service of this certificate and order, it shall be of no further force and effect.

By the Commission.

HAROLD D. McCOY
Secretary

[fol. 34]

APPENDIX "C" TO COMPLAINT

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

RAYMOND A. FLANAGAN being duly sworn, deposes and says:

1—That he is the General Chairman, Delaware, Lackawanna and Western System Division, Brotherhood of Maintenance of Way Employees with offices at 218 Adams Avenue, Scranton, Pennsylvania, and he has held this elective office since April 1936 and prior to that time was employed in the Maintenance of Way Department of the Delaware, Lackawanna and Western Railroad Company as a trackman, time keeper and assistant foreman. His employment with the DL&W began in April 1928.

2—As General Chairman it is his duty to represent employees in the Maintenance of Way Department of the Delaware, Lackawanna & Western Railroad Company in all matters affecting their wages, working rules and work conditions, and he represents said employees in the presentation of their grievances with the management of the DL&W.

3—He is familiar with the complaint filed by the Brotherhood of Maintenance of Way Employees against the United States and the Interstate Commerce Commission in the United States District Court for the Eastern District of Michigan to restrain the operation of the order entered by the Interstate Commerce Commission approving the merger of the Erie Railroad Company and the Delaware, Lackawanna and Western Railroad Company until such time as said order is conditioned in accordance with the requirements of Section 5(2)(f) of the Interstate Commerce Act.

4—That the facts herein stated are based upon personal knowledge of exhibits submitted by the Erie and the Delaware, Lackawanna and Western to the Interstate [fol. 35] Commerce Commission in the proceeding designated Finance Docket No. 20707 and the Railroads testimony offered in support thereof; conferences with management officials of the Erie and the Delaware, Lackawanna

& Western as to their plans for their Maintenance of Way forces after the merger becomes effective; collective bargaining agreements governing the rights of both railroad managements and their employees in the Maintenance of Way Departments; and the existing seniority rosters of employees which evidence each employee's seniority rights in the event of job vacancies due to transfer of work, death, retirement, dismissal or resignation of employees or abolishment of jobs.

5—Upon the effective date of the merger the Erie and the Delaware, Lackawanna and Western will make certain changes in work assignments and work forces and will reconstitute certain seniority districts which will bring into play the seniority rights of the employees of the Maintenance of Way Departments of both railroads.

6—The specific changes to be made and the date of the changes have not been made known by the Erie and the DL&W managements, however, on October 17, 1960, those managements will be authorized to make any changes they deem necessary to effectuate the merger, and conferences with those managements indicate that many such changes will take place immediately.

7—Under the provisions of the Interstate Commerce Commission order dated September 13, 1960 and issued on September 15, 1960 the Erie-Lackawanna, as the merged railroads will be known, will be able to abolish any and all jobs they deem necessary to effectuate the merger and the employees who are deprived of employment as a result of such job abolishments will be entitled to certain monetary allowances. Once the jobs are abolished however, and the [fol. 36] senior employees exercise their seniority rights to secure the positions of the employees with seniority rights junior to them with resultant transfers, lay-offs, etc., it will be a practical impossibility, should the Court sustain the complaint of the Brotherhood of Maintenance of Way Employees to "turn back the clock" and recreate the abolished jobs, move employees whose transfers were caused by those abolishments and thereby so restore the present status quo as to comply with the mandate of Section 5(2)(f). Attempts at such restoration could not be successful and would cause additional expense to the Erie-Lackawanna Management.

8—The result of such a situation would irreparably injure the employees involved because they would be deprived permanently of employment with the Erie-Lackawanna Railroad. Other employees would be transferred and the retransfer of such employees throughout the Erie-Lackawanna system would cause great and irreparable injury to them.

9—The Erie and the Delaware, Lackawanna & Western managements have testified that 600% more jobs will be created by natural attrition and will be abolished because of the merger and therefore no hardship should result to the Erie-Lackawanna as a result of the imposition of the employment protective conditions required by Section 5(2)(f). For example, the railroad management testified that during the first year following the effective date of the merger 2,507 will be created by attrition while 403 will be abolished.

10—However, if the conditions required by Section 5(2)(f) are not imposed many employees entitled to be retained in their employment will be forever deprived of that employment.

11—The railroad managements have testified that they intend to effect numerous abandonments of lines of railroad [fol. 37] after October 17, 1960 and also shift certain freight traffic from the lines of the DL & W to those of the Erie. The result of any of these abandonments and shifts of traffic will be a lessening of work for Maintenance of Way employees, abolishment of many jobs, and the transfer of other jobs. The employees affected will exercise their seniority rights and displace junior employees at other points. These employees in turn will displace employees junior to them and so on until those employees at the bottom of the seniority rosters will be deprived of employment. Such exercise of seniority rights will result in transfers of employees from one point to another and finally in the deprivation of the employment of the youngest employees. Should the Court uphold the complaint of the Brotherhood of Maintenance of Way Employes and enforce the requirements of Section 5(2)(f) the employees who had been deprived of their employment would have to be re-employed, all seniority rights readjusted, em-

ployees retransferred and job abolishments take place through natural attrition.

FURTHER deponent sayeth not.

/s/ RAYMOND A. FLANAGAN

Sworn to before me this
6th day of October, 1960

/s/ ROSE MCCANN

ROSE MCCANN
Notary Public, State of New York
No. 41-7793900, Queens County
Cert. Filed in New York County
Term Expires March 30, 1962

[Vol. 38] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

Civil Action No. 20575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
Plaintiff,

—v.—

UNITED STATES OF AMERICA, and
INTERSTATE COMMERCE COMMISSION, Defendants.

ORDER AUTHORIZING INTERVENTION OF PARTIES, DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY AND ERIE RAILROAD COMPANY—October 10, 1960

At a session of said Court held in the Federal Building, Detroit, Michigan on October 10, 1960.

Present: The Honorable Thomas P. Thornton, District Judge.

The Delaware, Lackawanna and Western Railroad Company and Erie Railroad Company having moved for leave

to intervene as parties defendant herein pursuant to Title 28 United States Code, § 2323, and Rule 24 of the Federal Rules of Civil Procedure, said motion having come on to be heard before this Court on October 10, 1960 and being consented to by the parties of record, and after due consideration thereof, it is

Ordered that said motion be, and hereby is, granted, and it is further

Ordered, that:

(1) The Delaware, Lackawanna and Western Railroad Company and Erie Railroad Company, as parties [fol. 39] defendant, may file pleadings and be otherwise represented herein by counsel in the same manner and with like effect as if they were named as original parties to this action;

(2) the names of Rowland L. Davis, Jr., whose address is 140 Cedar Street, New York 6, New York, Cravath, Swaine & Moore, 15 Broad Street, New York 5, New York, and Bodman, Longley, Bogle, Armstrong & Dahling, 1400 Buhl Building, Detroit 26, Michigan be entered as attorneys for the intervenors named above in this action;

(3) copies of any answers, pleadings, motions, notices, orders and other documents in said action be served upon intervenors' attorneys of record; and

(4) Intervenors be given an opportunity to be heard on any application to the Court for any decree, injunction, order, determination or finding with respect to any of the matters raised in this proceeding.

(5) Intervenors may file and serve a pleading setting forth their claim or defense no later than October 14, 1960.

Thomas P. Thornton, District Judge.

[fol. 40] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

Civil Action No. 20575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
Plaintiff,

—v.—

UNITED STATES OF AMERICA, and
INTERSTATE COMMERCE COMMISSION, Defendants.

ORDER AUTHORIZING INTERVENTION OF PARTIES, RAILWAY LABOR EXECUTIVES' ASSOCIATION—October 12, 1960

At a session of said Court held in the Federal Building, Detroit, Michigan on October 12, 1960.

Present:

THE HONORABLE THOMAS P. THORNTON
District Judge

The Railway Labor Executives' Association having moved for leave to intervene as a party plaintiff herein pursuant to Title 28, United States Code, § 2323, and Rule 24 of the Federal Rules of Civil Procedure, said motion having come on to be heard before this Court on October 12, 1960 and after due consideration thereof, it is

Ordered that said motion be, and hereby is, granted, and it is further

Ordered, that:

(1) The Railway Labor Executives' Association be treated herein as if it had been an original party plaintiff to the Complaint;

(2) The Railway Labor Executives' Association may file pleadings and be otherwise represented by counsel in the same manner and with like effect as if it were an original party plaintiff to this action;

(3) Copies of any pleadings, orders and other docu- [fol. 41] ments in said action be served upon intervenor's attorneys of record; and

(4) Intervenor be given an opportunity to be heard on any matter pending before this Court in this proceeding.

Thomas P. Thornton, District Judge.

[fol. 42] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

Civil Action No. 20575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
Plaintiff,

—v.—

UNITED STATES OF AMERICA, and
INTERSTATE COMMERCE COMMISSION, Defendants.

Transcript of Proceedings—October 12, 1960

Proceedings had and testimony taken in the above-entitled matter before Honorable Thomas P. Thornton, District Judge, at Detroit, Michigan, on Wednesday, October 12, 1960, at nine-thirty o'clock in the forenoon.

APPEARANCES:

William G. Mahoney, Esq., George E. Brand, Esq., and George E. Brand, Jr., Esq., Appearing on behalf of the Plaintiff.

Orrin C. Jones, Esq., Assistant United States Attorney, Appearing on behalf of the Defendant, United States of America.

B. Franklin Taylor, Esq., Appearing on behalf of the Defendant, Interstate Commerce Commission.

[fol. 43] Rowland L. Davis, Jr., Esq., Messrs. Cravath, Swaine & Moore (By Ralph L. McAfee, Esq.), Messrs. Bodman, Longley, Bogle, Armstrong & Dahling (By Richard D. Rohr, Esq.), Appearing on behalf of the Intervenors, Delaware, Lackawanna & Western Railroad Company and Erie Railroad Company.

* * * * * * *

[fol. 44]

STATEMENT BY MR. MAHONEY ON BEHALF OF PLAINTIFF

Mr. Mahoney: Now, your Honor, as we view the matter, the issue before your Honor at this time is a very limited one. It is one which arises under the United States Code, and it is for a very limited purpose.

As is stated in Section 2324 of that Code, a District Court "may restrain or suspend, in whole or in part, the operation of the Order of the Interstate Commerce Commission pending the final hearing and determination of the [fol. 45] action," which in this case, of course, must be heard and determined by a 3-Judge District Court.

We are here merely to determine whether the operation of the Interstate Commerce Commission Order, which becomes effective on Monday, October 17th, should be restrained in whole or in part to prevent irreparable injury to the plaintiff, the intervening plaintiff, and the employes they represent of these two railroads pending the expeditious hearing of this case before a 3-Judge Court.

Now, as Mr. Brand indicated, the railroad, the intervening railroad defendants, have served an Answer in this case to the Complaint, which I saw last night about eight o'clock, and in reading it I find that they failed or they refused to admit or deny that the plaintiff Brotherhood is an unincorporated association with headquarters in Detroit;

That it represents employes of the Erie and DL in this case, for whom it is bargaining agent;

And also refuses to admit or deny that the RLEA represents the interest of the plaintiff Brotherhood and the employes it represents.

The Answer denies that the RLEA, the Railway Labor Executives Association, intervening plaintiff, presented to the Interstate Commerce Commission the same claims which the Brotherhood presented to the Court in this [fol. 46] case.

It challenges the accuracy of the number of jobs which are stated in the Complaint as being abolished or transferred.

It denies that 5 (2) (f) governs the authority of the ICC in this matter.

It denies any irreparable injury will result to employes of the railroad should the merger become effective on the 17th of October under the conditions imposed by the Commission.

And it denies that the plaintiff or the employes represented by the plaintiff, the Brotherhood, pursued the administrative remedies available to them before the Interstate Commerce Commission since neither the plaintiff nor the employes they represent were parties before the Interstate Commerce Commission.

They claim as affirmative defenses that the plaintiff is guilty of laches because, while the Order of the Interstate Commerce Commission was served on September 15th, the plaintiff waited 22 days before filing its Complaint, and I point out in that regard it was also filed over ten days before the Order would become effective.

They claim that irreparable injury will result to employes—or, rather, to the railroad defendants if any delay is granted by this Court in the effectuation of the merger. [fol. 47] Now, with regard to these matters which the Answer raises, the factual differences, I would like to call to the stand Mr. Harold C. Crotty.

Mr. Crotty.

HAROLD C. CROTTY was thereupon called as a witness on behalf of the Plaintiff, and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Mahoney:

The Clerk of the Court: Your name, please?
The Witness: Harold C. Crotty.

By Mr. Mahoney:

Q. Mr. Crotty, would you give your full name, business address, and occupation, to the Court, please?

A. My name is Harold C. Crotty. My office address is 12050 Woodward Avenue. I am the President of the Brotherhood of Maintenance of Way Employes.

Q. The President of the organization which instituted the present suit?

A. Yes, sir.

Q. How long have you been the President of that organization?

A. A little over two years.

Q. What office did you hold prior to that time, and for what length of time?

[fol. 48] A. For the ten-year period prior to 1958, I was assistant to the president of the International Brotherhood.

Q. Is the Brotherhood an incorporated or an unincorporated association?

A. It is unincorporated.

Q. Where are its headquarters?

A. In Detroit, Michigan.

Q. When was it founded?

A. In 1873.

Q. Is the Brotherhood the collective bargaining representative of the employes of the maintenance of way craft of both railroad defendants?

A. Yes, we are.

Q. Has it been duly authorized and recognized as such bargaining agent under the Railway Labor Act?

A. It has.

Q. Do you have any contracts with the railroads with regard to the employes you represent?

A. Yes, we have contracts with both the Erie and DL & W.

Q. What do these contracts cover, very generally?

Mr. Davis: I object to that. I think the contracts are the best evidence, if the Court please, as to what they cover and what they provide.

The Court: I will sustain the objection.

By Mr. Mahoney (continuing):

Q. What is the duty of a collective bargaining agent [fol. 49] under the Railway Labor Act?

Mr. Davis: I object to that. I think the Act speaks for itself. I think we can look to the Act for the law.

The Court: Well, we can get the Act, but if he knows it will save the trouble of getting the Act.

Go ahead.

I don't think we should be too picayunish here in our objections. All we are trying to do is get the thing out in the open.

A. Well, our responsibility under the Act obligates carriers and the Brotherhood to negotiate in behalf of the employes concerning rates of pay, rules, and working conditions.

Q. Would you describe the work performed by the employes whom you represent on these railroads—which the organization represents?

A. Well, generally, the maintenance of way employes build and maintain the tracks and the bridges and buildings that are used by the railroad companies in their operation as a common carrier.

In addition, the employes we represent provide the protection at highway crossings, and they operate the machinery that is used in the maintenance of way department.

Q. How many employes do you have presently on each [fol. 50] of these railroads that you represent, if you know?

A. Well, we have about 600 on the DL & W and approximately 1600 on the Erie.

Q. Now, with regard to your contracts, do you know whether these contracts will remain in effect, or will they be terminated upon this merger of the Erie and the DL?

A. The contracts will remain in full force and effect until such time as the parties negotiate a change.

Q. Under the contracts which you maintain with—which your organization maintains with the Erie and the DL & W, what precisely happens to an employee when a job is abolished by either or both of the railroads?

A. In the railroad industry, the working agreements provide for the establishment of seniority, and in the operation of that seniority, in instances where forces are increased or forces are reduced, if positions are abolished, an employee will exercise the seniority that has been credited to him on the seniority rosters that are drawn up and posted as a requirement under the agreement.

For example, an employee who had been in the service of either railroad for fifteen years would have a seniority date of 1945. The month and the day would be identified. If his job were abolished, he, in turn, would have the right to displace an employee junior in service to him, and this employee that he displaced would, in turn, have the right [fol. 51] to displace another employee junior to him.

Q. And, to your knowledge, do these displacements ever require these employes to relocate over any distances at all?

A. It is not unusual for a seniority territory to be, oh, one hundred miles in length. And, when seniority is exercised at certain points in that territory, it in some instances requires the employee to move his home and his headquarters point.

Q. Now, could the—once the employee has been bumped—I believe it is called—from his position by a senior employee and relocates to another point on the line, moves his family over, is it possible that because of

further abolishments of jobs this single employee might be relocated again?

A. Yes, that is very possible. It happens.

Q. Now, in the case of your maintenance of way employes, do the railroads normally abolish the jobs one at a time, or do they abolish them in groups, or just how is it normally done in the Maintenance of Way Department, in your experience?

Mr. McAfee: May I have that question again, your Honor?

The Court: Yes. Repeat the question, Mr. Buckley.

(The last question was thereupon read by the reporter.)

Mr. Davis: I think I will object to it on the ground [fol. 52] there has been no foundation laid, your Honor, for the question. In fact, there has been no foundation laid for a lot of these questions that have been asked.

What happens generally, I don't believe is applicable to this particular situation.

Mr Mahoney: Your Honor, I expect to relate this to this particular situation, but I think that it is important to point out what happens in the industry and then what will happen on this railroad.

These things—there have been job abolishments on this railroad before, and Mr. Crotty is thoroughly familiar, personally familiar, with what happens to employes on these two railroads as a result of these job abolishments.

I intend to relate them directly to these two railroads, but I thought it would be of more value to the Court to get a general picture first.

The Court: On the representation by counsel that he will connect it up, I will overrule your objection.

A. To answer the question, job abolishments have taken place in both forms. There have been instances when jobs have been abolished singularly and other instances where jobs have been abolished in groups.

And, when a job is abolished singularly, the individual [fol. 53] exercises his seniority as I have previously related, and then that individual whom he displaces, displaces another junior employee, and down at the bottom

of the ladder the individual who doesn't hold enough seniority to remain in service is out of service.

Q. Now, this bumping process can affect a few or a great number of employes; is that right?

A. Yes. There is no way to determine precisely how many moves might be involved. It is just the operation of seniority.

Q. So that when there are a number of jobs abolished, all these employes then bump all other employes and it continues down through the entire line?

A. That is what happens.

Q. Then the youngest on the seniority roster in form of service are then deprived of their employment; is that correct?

A. That is correct.

Q. Now, with regard to the two railroad defendants in this particular case, during your experience as the President of this organization and as the assistant to the President of this organization, have you any personal knowledge as to any job abolishments which have taken place on these two railroad defendants?

A. Oh, yes.

Q. In the past?

A. Yes. There have been a number of job abolishments in the past.

Q. Now, has the result to employes on these two [fol. 54] railroads been exactly the same—

Mr. Davis: (Interposing) Wait a minute. I am going to object. This is a leading question—

Mr. Mahoney: (Interposing) Very well.

Mr. Davis: (Continuing) —if the Court please.

Mr. Mahoney: I will withdraw it.

Mr. Davis: I was thinking Mr. Mahoney has been leading the witness, and I have not objected to the present time, but it seems to me he should let the witness testify.

By Mr. Mahoney (continuing):

Q. What has happened to employes on the Erie Railroad Company and the Delaware, Lackawanna & Western Railroad Company represented by your organization

under the contracts maintained by your organization with these railroads? What has happened to these employes in the past when jobs have been abolished?

A. They have exercised their seniority as they are entitled to do under the contracts. They have displaced junior employes. Junior employes, in turn, have displaced other junior employes. And, in the end result the junior employes on the seniority districts were deprived of jobs.

Q. Now, you are familiar with the contracts now in effect?

A. Yes, sir.

Q. Will that same thing happen to employes on the Erie [fol. 55] and the DL if jobs are abolished under this merger?

Mr. Davis: I object to that because we don't have the contracts in evidence, and he is interpreting the contract.

The Court: May I have the question again Mr. Buckley?

Mr. Brand: May I ask whether the contract is in the courtroom, or copies of it? Do you have copies of it?

Mr. Davis: No, I do not have copies of the contract.

The Court: May I have the question?

(The last question was thereupon read by the reporter.)

The Court: I will overrule the objection.

A. Yes, the same thing will happen.

By Mr. Mahoney (continuing):

Q. Mr. Crotty, are you familiar with the conditions which the Commission imposed in the merger case, in this case, regarding employes, the so-called New Orleans conditions?

A. Yes, I am.

Q. Do these conditions protect an employee from this bumping effect which you have described as happening upon the abolishments of jobs?

A. No, they do not.

[fol. 56] Q. When do the conditions, these employes protective conditions, the New Orleans conditions, when do they become effective?

A. They become effective when an individual is adversely affected insofar as earnings are concerned as a result of job loss through merger or consolidation.

Mr. McAfee: Your Honor, this gentleman is now interpreting a decision of the Federal Court. I earnestly submit he is not qualified to do that.

The Court: It has only been identified here with New Orleans. It might be the Federal Court; it might be a night club down there. I don't know what it is.

Mr. McAfee: I will assure your Honor it is a decision of a Court, a special Court in New Orleans.

The Court: It was mentioned in some of the pleadings here, or some of the exhibits.

By Mr. Mahoney (continuing):

Q. For the—

The Court: (Interposing) What is the citation?

By Mr. Mahoney (continuing):

Q. For the clarity of the record here, Mr. Crotty, would you explain what the New Orleans conditions are? The Commission has imposed them in this proceeding when it was before it.

Mr. Davis: I am going to object to that because the New Orleans conditions were laid down by the Interstate Com-[fol. 57] merce Commission in, I think, 282 ICC.

The Court: Is there a Federal Court decision on that?

Mr. Davis: And that went to the Federal Court later on.

Mr. McAfee: It went to the Supreme Court, your Honor, and that has been cited to you.

Mr. Mahoney: Your Honor, the Supreme Court, the only decision involving these so-called conditions involved the New Orleans Union Passenger Terminal case before the Supreme Court.

The Commission imposed a certain type of condition in 1950 which expired at the expiration of four years from the date of its Order.

The Railway Labor Executives Association took the position that since no employes were going to be affected

in thei. ·ployment at all during this four-year period because the station was under construction and they would only be affected after the station became operative, that something more than a four-year period of protection was necessary.

They agreed—the Supreme Court said that was true, and it went back to the Commission, and the Commission drafted these conditions which I have here, which I will be very happy to put into the record, and they drafted them and [fol. 58] they imposed them; and they have been, since 1950, called the New Orleans conditions.

It is a formula of compensatory protection for employes affected by merger or any other situation arising under Section 5 (2).

The decision of the Court has never interpreted what these conditions do. The Commission drafted the decision.

The Court: Their objection is that a lay person is interpreting a decision of a Federal Court, and, if you have the determination by the Federal Court, that would seem to obviate the need for the objection.

Mr. Mahoney: Actually what I asked Mr. Crotty is if he was familiar with the New Orleans conditions.

Now, the New Orleans conditions is a formula which the Interstate Commerce Commission drafted and imposed in the New Orleans case. It is nothing that the Supreme Court did, or any other Court; this is something the Interstate Commerce Commission did after the Supreme Court made a ruling as to its power under Section 5(2) (f), the requirements under that section.

The Court: I will take the answer to it, if he is familiar with the New Orleans situation.

Mr. McAfee: Would you like the citations, your Honor, in the special Court and the Supreme Court?

[fol. 59] The Court: Yes.

Mr. McAfee: 84 Federal Supplement 178, and 339 U. S. 142.

The Court: Thank you. Go ahead.

By Mr. Mahoney (continuing):

Q. You are familiar with these conditions, Mr. Crotty?

A. Yes, I am.

Q. Have you had any personal experience with them as they have affected the employes you represented in previous ICC cases?

A. Yes, I have.

Q. Now, in those cases has it been your experience that these conditions become operative before or after an employee exercises his seniority rights and moves—and bumps someone junior to him?

A. They do not become operative until after the employee exercises his seniority and has made a change.

Q. Now, still based upon your experience under these conditions, if an employee is forced to exercise his seniority rights and moves from one location to another, do these conditions, or do they not, require that his moving expenses be paid by the carrier?

A. They obligate the carrier to reimburse him for the cost of moving expenses insofar as the initial move is concerned.

Q. Now, after an employee has moved and his expenses have been paid, if he is forced to move again because of a [fol. 60] senior employee through other job abolishments that requires him to exercise his seniority rights and he has to move again, are his moving expenses paid under these conditions?

A. No, they are not.

Q. We are interested here in what happens to all of these people should this bumping process get into effect. What happens to the youngest man on the seniority roster, or the youngest men?

Mr. Davis: In the Maintenance of Way Department.

Mr. Mahoney: In the Maintenance of Way Department.

By Mr. Mahoney (continuing):

Q. What happens to them when the bumping process is commenced after jobs are abolished?

A. They are deprived of employment and are eligible for the protective conditions as laid down by the Commission.

Q. The compensatory conditions, the New Orleans conditions?

A. That is right.

Q. Now, what rights, when a man is furloughed and deprived of his employment as a result of this process, what rights of his are affected?

A. Well, his seniority rights become of no value to him because he no longer has a job. His fringe benefits that he might be entitled to under the contract, such as health and welfare protection, and hospitalization, life insurance, [fol. 61] would become inoperative.

His eligibility for, and his right to, an annuity at some future date might be jeopardized.

Q. What type of annuity do you speak of?

A. An annuity under the Railroad Retirement Act; an annuity to which he has contributed during the years that he has worked for the railroad.

The Court: You say his annuity might become in jeopardy. What do you mean by "might"?

A. Well, your Honor—

The Court: (Interposing) That means it might or might not, and that isn't much of a statement.

A. Well, your Honor, an individual who has worked for a railroad for ten years or more, even though he is furloughed, retains his rights at some future date to receive an annuity under the Railroad Retirement Act based upon his years of service with the employing carrier and his earnings during that period.

If his years of service are less than ten, then his account is transferred to Social Security and the annuity that he will receive some day upon retirement is substantially reduced below that that he would receive under railroad retirement. That is because the contributions to railroad retirement are substantially more than the contributions to Social Security.

[fol. 62] The Court: All right.

By Mr. Mahoney (continuing):

Q. Would this bumping process, exercise of seniority rights that you have described, occur if the Brotherhood

interpretation of the requirement of Section 5 (2) (f) is sustained?

Mr. McAfee: I object, your Honor, unless that interpretation is stated for the record, because I, for one, can't tell what they are asking this Court in their petition.

Just their interpretation is too vague, and it isn't set forth anywhere in the papers before the Court.

The Court: I will take the answer.

By Mr. Mahoney (continuing):

Q. Would you answer?

A. No. The—

Q. (Interposing) What would happen, then—so that counsel and the Court will know—under this interpretation? What would happen to an employee when a job is abolished?

A. Well, he would be provided with a position of a similar class under circumstances where he would not be adversely affected, and he would continue to be employed by the carrier at the wage rate he was receiving at the time the change took place.

Q. Would he—if the carrier moved work from one place to another, from point A to point B, would he—could he stay at point A and say, "The heck with it," or would he [fol. 63] have to move?

A. He would have the right to follow the work, the work that was moved as a result of the merger.

Q. He would have to move?

A. Yes, he would have to move.

Q. He would have to follow the work. When he got at this other location would he, under this interpretation, would he be required to—forced to bump anybody out?

A. No.

Q. Under these circumstances, wouldn't this create a surplus of jobs, men working in jobs that were not needed?

Mr. Davis: I object to this. I don't understand what he means "under these circumstances." I think it is too indefinite, your Honor please.

The Court: I will sustain the objection, unless you clarify the circumstances.

By Mr. Mahoney (continuing):

Q. I believe you just testified that an employee would, under this interpretation which the Brotherhood places on the Section 5 (2) (f), that the employment must be maintained for a period of four years after the merger as it was before?

A. That is true.

Q. That an employee would have to be given, if work was moved or abolished, or what have you, an employee would have to be given an equivalent job; is that correct?

[fol. 64] A. That is right.

Q. Now, assuming that there were ten jobs in a certain point and the carrier now has need for only nine at that point, the carrier under these circumstances would still have to employ ten men; is that correct?

A. They would employ ten men either at that point or on that seniority territory.

Q. Right. Now, suppose there were only really need for nine right today, would this create a burden on the carrier, a surplusage of employes to jobs?

A. The carriers, in their presentation to the Interstate Commerce Commission, said that attrition would readily take care of this problem.

The Court: This is as good a point as any for me to ask a question. To be absolutely honest, I don't know what is meant by the term "attrition," as it is used here, so I would like you to explain what is meant by jobs created by attrition.

By Mr. Mahoney (continuing):

Q. Would you explain that to his Honor?

A. Well, the term "attrition" as we use it in our railroad parlance would mean job losses brought about by deaths, retirements, discharge for cause, any normal turnover other than job abolishment or forced reductions.

It was indicated that the rate of attrition in the railroad [fol. 65] industry in this instance was about ten per cent per year of the employes.

Q. Do you know, sir, exactly how many employes that

your organization represents who will be—whose jobs will be abolished or relocated as a result of this merger?

A. No, I do not.

Mr. McAfee: Your Honor—I am sorry.

By Mr. Mahoney (continuing):

Q. Therefore, you don't know precisely—

Mr. Davis: (Interposing) He has answered the question, Mr. Mahoney. The answer was "No."

Mr. Mahoney: May I ask him another one?

Mr. Davis: Not on the same point, I don't think.

The Court: Wait a minute. I am running this courtroom—

Mr. Davis: (Interposing) I am sorry, sir.

The Court: (Continuing) —not you. I wish you would preserve a little decorum in that respect.

Mr. Davis: I am sorry. I apologize.

By Mr. Mahoney (continuing):

Q. You don't know precisely how many employes would be affected by this bumping process, therefore; is that correct?

Mr. McAfee: If the Court please, that is an attempt to have the witness retract his prior answer. He is attempting [fol. 66] to impeach his own witness, and it is an incorrect paraphrase of the prior question and prior answer.

Mr. Mahoney: Your Honor please—

Mr. McAfee: (Interposing) I ask that it be read, if there is any question about it.

Mr. Mahoney: I ask that the first question be read.

Mr. McAfee: Yes, the first question and answer.

The Court: All right, read the first question and answer.

The Reporter: (Reading)

"Q. Do you know, sir, exactly how many employes that your organization represents who will be—whose jobs will be abolished or relocated as a result of this merger?

"A. No, I do not."

Mr. Mahoney: The second question, then, was whether he knew, in the light of that first answer, whether he knew

how many employes would be affected by the bumping process which results from job abolishments or relocations of employment.

The Court: If he wouldn't know one, how could he know the other?

Mr. Mahoney: I just wanted to get that in the record, [fol. 67] because they are two different things.

A. The answer is the same. No, I do not.

By Mr. Mahoney (continuing):

Q. Could you tell us why you do not know that?

A. Well, we have attempted to establish what the effect would be on the employment of the Maintenance of Way Department in the various conferences that our representatives have had with the representatives of management of the Erie and the DL &W. In those conferences they were assisted by our Vice President from the—that serves that territory. But, to date, we have not been able to ascertain what the net effect will be of the merger insofar as our employment is concerned, or the effect insofar as job displacements are concerned.

If I may, I might add, Mr. Mahoney, that it is obvious to me that there are going to be adverse effects on our employes, and there will be jobs abolished, and there will be requirements that employes move and displace other employes, because the carriers have stated in their submissions to the Interstate Commerce Commission that certain branch lines, certain tracks, are going to be abandoned; certain facilities, certain yards, buildings, bridges, will no longer be in use.

So, obviously, the men who have built and maintained those bridges and buildings, tracks, down through the years [fol. 68] will no longer be employed; or, those particular positions will no longer be in existence.

OFFERS IN EVIDENCE

Mr. Mahoney: Your Honor, if I may, I might support that answer of Mr. Crotty's, I would like to introduce as an exhibit portions of this Exhibit H-48 that was identified

before the Interstate Commerce Commission, which is entitled, "Report on Economics of Proposed Merger," and prepared by Wyer, Dick & Co., of Upper Montclair, New Jersey, for the use of the railroads in presenting their case to the Interstate Commerce Commission.

I would like to introduce the portion of this report on economics entitled "Study No. I," which sets forth the common points which the Erie and the Lackawanna serve, and abandonments which will take place in the yards and so forth, at these common points.

And Study II, which sets forth the duplicate lines which will result and the abandonments which they claim in those two lines, duplicating lines.

Also, Study XVI, which sets out the number of—in the opinion of the carrier—the number of employes who will be affected and the ways in which they will be affected.

The Court: Do you have those particular parts of that book marked so that we can have it marked as an exhibit? [fol. 69] Mr. Mahoney: Yes, your Honor.

The Court: Have the book marked 2, and then 2-A and 2-B.

Mr. Davis: Could I be heard on this?

The Court: As soon as he gets it marked.

Mr. Davis: I was going to say I might save some time. I would not object to the entire exhibit going in.

The Court: That is what I was thinking.

Mr. Davis: The entire exhibit should go in rather than portions of it, and then you have the complete picture.

The Court: I agree with you.

Mr. Mahoney: I am perfectly agreeable to that.

The Court: Put the whole book in, and mark that 2, and the one study 2-A, and the other 2-B.

If you want to give that to the Court Reporter, he will mark it.

(A booklet entitled, "Erie Railroad Company, the Delaware, Lackawanna & Western Railroad Company. Report on Economics of Proposed Merger," was thereupon marked Plaintiff's Exhibit 2 by the reporter.)

(Study I of Plaintiff's Exhibit 2 was thereupon marked Plaintiff's Exhibit 2-A by the reporter.)

[fol. 70] (Study II of Plaintiff's Exhibit 2 was thereupon marked Plaintiff's Exhibit 2-B by the reporter.)

(Study XVI of Plaintiff's Exhibit 2 was thereupon marked Plaintiff's Exhibit 2-C by the reporter.)

The Court: Exhibit 2 is admitted. That automatically admits 2-A, 2-B and 2-C.

What does Study XVI cover?

Mr. Mahoney: That is the one that has the number of jobs created by attrition; the employes to be affected by this overall.

The Court: I thought that was—all right.

Mr. Mahoney: Your Honor, I would like to call your attention for the moment to Exhibit 2-A, Study I of Exhibit 2.

As an example of the type of activity the carriers plan, they intend a concentration of freight yard operations and facilities at various points which will make possible, as they characterize it, certain major abandonment, and they list them.

And, in East Buffalo, for instance, they have listed:

(Reading):

"JX Yard: Entire yard and buildings.

"Old BSW Yard: Entire yard and buildings.

[fol. 71] "Eastbound Departure Yard: Entire yard and buildings.

"Eastbound Receiving Yard: Entire yard and buildings.

"North Yard: Entire yard.

"Repair Yard: Entire yard and buildings,"

and so forth.

So that we think this exhibit supports the statement of Mr. Crotty that he knows or the plaintiffs know, without being told precisely by the railroad what they are going to do, that there will be job dislocations and job abolishments to the employes represented by him as a result of the merger, and that is the purpose of that exhibit.

By Mr. Mahoney (continuing):

Q. Mr. Crotty, you have described what would happen when an employee exercises his seniority rights, the bump-

ing process, and so forth. Now, in your opinion, sir, having experience, having seen this happen for a period of many years, and having personal experience with it, in your opinion, would it be possible to restore these employes to status quo once these jobs are abolished and this change has taken place?

Mr. Davis: May I be heard on an objection on that, please?

The Court: Yes.

[fol. 72] Mr. Davis: First off, I don't think that it has been proven yet that any employes will be separated from service.

And, secondly, if they are separated from service, there has been no showing by Mr. Crotty that they will not have jobs available for them in their same seniority district by reason of attrition or other cause.

It seems to me that it is pure speculation; it is not based on any fact.

The Court: Well, it is as much speculation one way as it is another. But this study, that I understand is here now as an exhibit, does make a computation of jobs to be abolished and jobs created by attrition of displaced employes.

So, if this was submitted to the Commission—and I don't know whether it was or not. I presume it was.

Mr. Davis: It was, sir. Exhibit 48.

The Court: (Continuing) —then doesn't this have any application to the action of the Commission? And, if it does, isn't this based on conjecture and surmise and guesswork?

Mr. Davis: It covers all organizations, your Honor please, and not merely the maintenance of way employes.

The Court: Regardless of that, it is something projected in the future.

[fol. 73] Mr. Davis: That is true, sir.

The Court: And these people, they apparently are drawing on the background of their experience with other railroads and other mergers.

Mr. Davis: That is right.

The Court: And I presume that is what this gentleman is doing. So, I think he is as competent in his field just the same as these people. I don't know. That seems to present itself to me.

If there is any guesswork here, it is certainly guesswork over here (indicating).

Mr. Davis: All right.

The Court: So, what you are actually telling me is that the Commission was operating on the basis of a conjectural study made by somebody retained by the railroads.

Mr. Davis: That is correct.

The Court: I will overrule the objection.

Mr. Mahoney: Do you want the question repeated?

The Witness: I remember it, I think.

By Mr. Mahoney (continuing):

Q. All right.

A. It would be impossible, in my opinion, to put the men back where they belong if this original operation was permitted to come into being. It involves selling of homes, moving, taking families out of school, giving up community [fol. 74] lives that they have experienced for years.

I don't believe it would be possible to right the thing after it had once taken place.

Q. Mr. Crotty, are you a member of the Railway Labor Executives Association, the intervening plaintiff in this proceeding?

A. I am.

Q. Will you tell us, sir, who the—generally, who the members of this organization are?

A. The Railway Labor Executives Association is composed of the chief executive officer of each of the twenty-three standard railroad Brotherhoods.

Q. What, generally, does this association do with regard to its membership? What function does it perform for its members?

A. Well, we try to coordinate our activities, the activities of the twenty-three railroad Brotherhoods, to protect and promote the interest of the employes that are represented by those twenty-three organizations.

We engage in operations in the legislative field and in any area where we have things in common before any Government commission or tribunal.

Mr. McAfee: Your Honor please, I respectfully submit I don't believe this is relevant to the question before the Court.

Mr. Mahoney: I am just asking him to describe the general activities of this organization, which is a plaintiff, [fol. 75] too.

The Court: All right. I will overrule the objection.

By Mr. Mahoney (continuing):

Q. Have you any personal knowledge of the Association's participation in the Erie-DL merger when it was before the Interstate Commerce Commission?

A. I do.

Q. From your own personal knowledge, can you tell us whether the organizations whose chief executives are affiliated with the RLEA represents substantially all the employes of the Erie and the Delaware, Lackawanna & Western Railroad?

A. To the best of my knowledge, it represents all of the employes that are under contracts.

Q. From your own personal knowledge, do these organizations, do these other organizations on the Erie and the DL have, generally, the same type of agreements with those railroads as your own organization, with regard to seniority?

A. They are identical in principle. They may vary as to language.

Q. Now, under those agreements, then would the bumping process which you have described as taking place in the maintenance of way craft to employes you represent also take place in the other crafts of other employes of these railroads?

A. The net result would be the same. The effect would be the same.

[fol. 76] Mr. Mahoney: I have no further questions of Mr. Crotty. If your Honor or opposing counsel have any—

The Court: All right.

Mr. McAfee: If the Court please, I apologize for the way we have been jumping up all over the room.

The Court: All right.

Mr. McAfee: We did not realize a witness would be called here today.

May I suggest, so that we have some orderly procedure, that we have a short recess?

The Court: There hasn't been anything disorderly about it up to now.

Mr. McAfee: Thank you, your Honor.

The Court: The statute says the Court is required to make a finding, and I presume the finding I make is from some testimony.

Mr. McAfee: Well, it refers really—well, your Honor is correct in your recollection. But could we have a short recess to decide upon a spokesman?

The Court: All right. Of course, I don't care how many speak.

How much time do you want?

Mr. Davis: Five minutes is plenty.

The Court: All right, we will take a five-minute recess.

(A recess was thereupon taken.)

[fol. 77] Mr. Mahoney: If your Honor please, I mentioned that I had these New Orleans conditions, and I would be very happy to put them in evidence.

The Court: All right. Does anyone have any objection?

Mr. Davis: I don't believe I have a copy of them.

(A document was thereupon handed to Mr. Davis by Mr. Mahoney.)

Mr. Davis: I never saw them.

Mr. Mahoney: Is there an objection to it?

Mr. Davis: Will you give me one?

Mr. Mahoney: I will. I will be happy to.

Mr. McAfee: I don't know.

The Court: Why don't your wait and hand it around there.

Mr. Mahoney: I will hand it around. Yes, your Honor.

The other thing, there was some question about the agreements which this Brotherhood has with these railroads,

and these agreements, we have sent for them and they are on their way, and I would like to have them introduced as exhibits also, sir.

The Court: All right.

Mr. Mahoney: Thank you, your Honor.

[fol. 78] Cross examination.

By Mr. Taylor:

Q. Mr. Crotty, have you testified with some frequency over the years in coordination proceedings of one sort or another involving these two railroads—abandonments, or trackage right agreements, or proceedings of a nature that might result in displacement of jobs and the imposition of conditions?

A. You asked me specifically, sir, didn't you, proceedings involving these two railroads?

Q. Yes.

A. The answer is, "No, I have not."

Q. Have you testified in proceedings of this nature involving other railroads?

A. I have never testified in any proceedings before the Interstate Commerce Commission. I have been a party to conferences and discussions regarding other mergers and coordinations involving other railroads.

Q. Have you been a party to discussions involving the nature of the employee protective conditions which should be imposed in a proceeding where they would be appropriate?

A. Yes, I have.

Q. Prior to this case has your Brotherhood advocated the type of protective condition which has been advocated here?

A. Yes, we have.

[fol. 79] Q. Do you have a particular proceeding in mind?

A. Yes, I do. The merger of the Norfolk & Western, and the Virginian Railways.

Q. Now, in that merger the protective conditions which are akin to the conditions which you are advocating in this proceeding were the result of a stipulation or agreement between the railroads and the employee organizations, were they not?

A. That is correct.

Q. They were not imposed by the Commission?

A. Only after stipulation.

Q. In fact, the Commission, on its own, imposed the so-called New Orleans conditions, did it not?

A. That is correct.

Q. Generally speaking, in the past, have not the labor organizations been rather completely satisfied, or at least have agreed to the imposition of conditions like the Oklahoma or New Orleans conditions?

A. Well, we have never been faced with the magnitude of the situation such as we are now confronted with; the mergers that are already in being and those that are contemplated.

The Court: I don't think that answers the question. Will you read the question, Mr. Buckley?

(The last question was thereupon read by the reporter.)

[fol. 80] A. I will have to say that we have never been completely satisfied.

By Mr. Taylor (continuing):

Q. But you have accepted those conditions?

A. We have.

Q. And, as a general rule, proposed such conditions; is that not true?

A. In certain instances we have, yes.

Q. And this practice or course of conduct has existed over many years until just recently; is that not correct?

A. That is true.

Q. I mean, these New Orleans or Oklahoma conditions involve conditions which are usually and normally imposed with the agreement of the labor organizations in proceedings involving the displacement or potential displacement of employees for a number of years; isn't that correct?

A. That is true insofar as the limited number of proceedings are concerned that have taken place.

Q. But, as I understand it, it is your position that we are entering an era whereby mergers may be more frequent

than they have been in the past ten or twenty years and that this has brought about a re-evaluation of the types of protective conditions which would do the job and have led you people to now take the position that you would need conditions which would substantially freeze the em-
[fol. 81] ployment situation for a period of four years? Is that a correct summary of your thinking today?

A. That is, I think, very properly quoted.

Q. Now, the statute itself hasn't changed so far as Section 5(2) (f), which is the statutory provision we are concerned with, since 1940, has it?

A. No, it has not.

Q. But, today, your fresh look would indicate to you people that that statutory provision requires the imposition of conditions which would freeze the employment situation for a period of four years; is that correct?

A. Yes, that is correct. We have problems today that we have never had before, and that is what we are trying to solve.

Q. Is it your position that the Commission has discretion to impose the type of conditions which are represented by the New Orleans conditions, or the type of conditions which you are urging in this proceeding, or is it your position that the Commission is required to impose the type of conditions which you are urging here?

A. We feel the Commission is required to impose the type of conditions we are urging.

Q. And that over the past fifteen or twenty years the Commission, in fact, has not properly discharged its duty under the statute?

A. We feel they have imposed—

[fol. 82] Mr. Brand: (Interposing) We object to that, if the Court please. We are not in a position to condemn the Commission.

The Court: I was wondering, Mr. McAfee objected to a question, and the basis of his objection was that the witness was being called upon to interpret the Federal Court's determination, and you are asking him to interpret a statute.

Mr. Taylor: I will withdraw that question, your Honor.

The Court: One minute he is a lawyer and the next minute he isn't.

All right.

Mr. Taylor: I think that is all the questions I have.

Cross examination.

By Mr. Davis:

Q. Mr. Crotty, you are familiar, are you not, with the proceeding which the Lackawanna and the Erie brought to coordinate and consolidate their facilities between Binghamton, New York, and Gibson, New York?

A. Yes, I remember the proceedings.

Q. And that was Finance Docket No. 19989 before the Interstate Commerce Commission?

[fol. 83] A. I believe that is correct.

Q. And didn't that involve a large discontinuance of trackage on the Lackawanna?

A. I wouldn't classify it as large, sir, as compared to the present situation that is under discussion.

Q. Well, eventual abandonment of trackage, and a lifting of the second line between other points, was it not?

A. It involved approximately 50 employes that were represented by my Brotherhood, if my memory serves me correctly.

Q. And in that proceeding your organization, the Railway Labor Executives Association, stipulated the New Orleans conditions, did they not?

A. That is true.

Q. Thank you. That coordination took effect on August 31, 1959; is that correct?

A. I have no reason to dispute the date.

Q. Now, Mr. Crotty, do you know whether any employes of the Lackawanna or the Erie are represented by the Transport Workers Union?

A. There is a possibility that a handful of those working at the dock might be represented by the Transport Workers.

Q. Do you know whether any of the employes of the Lackawanna or the Erie are represented by the United Mine Workers of America?

A. No, I didn't know that.

[fol. 84] Q. Do you know whether any of the employes of the Lackawanna or the Erie are represented by the Teamsters Union?

A. I do not know.

Q. Do you know whether or not any of the employes of the Lackawanna are represented by the Railroad Patrolmen's International Union?

A. I presume a few were.

Q. In other words, they represent our policemen; is that correct?

A. They generally take on all railroads.

Q. And they are not a member of the Railway Labor Executives Association?

A. No, they are not.

Q. Or any of the other organizations I have mentioned?

A. No, they are not.

Q. Do you know whether any of the employes of the Lackawanna or Erie are represented by the National Maritime Union?

A. No, I do not know.

Q. And that organization is not a member or affiliated with Railway Labor Executives Association?

A. No, they are not.

Q. Do you know whether or not any of the employes of the Erie or Lackawanna are represented by the Lighter Captains Union, Local 996, ILA?

A. No, I do not.

[fol. 85] Q. They are not represented by Railway Labor Executives Association?

A. No, they are not.

Q. Will attrition, as you have defined it, take care of all of the employes you represent, your organization represents, as the bargaining agent of the Lackawanna and Erie?

A. Well, if the degree of attrition as presented by the carrier before the ICC were permitted to function over a relatively few years, if that degree is correct, I would think that attrition would take care of it within a few years.

Q. And, Mr. Crotty, when a man is affected by a forced reduction and goes on the furlough roster, he still retains his seniority date, does he not?

A. He retains it for a stipulated period of time.

Q. And how long is that stipulated period of time?

A. It varies from one railroad to another, and from one class on a given railroad to a different class on a given railroad.

Q. Let us talk about the Erie, Lackawanna as long as they are involved in this proceeding. What stipulation of time is on the Erie, Lackawanna, if you know?

A. I do not want to be precise about it, because I cannot be. We have over 400 different contracts that we are now policing and generally those periods of protection are from one to two years.

Q. But you don't know what the period of protection is [fol. 86] on the Erie or Lackawanna under the contract?

A. I couldn't give you the protective period for each class of employes on each railroad, no.

Q. Thank you. But if a force is increased following a forced reduction, and the increase occurs during the period of time, whatever it may be, men are returned to employment on the basis of seniority, are they not, from the furlough list?

A. That is true.

Q. And if there is a forced reduction because of economic conditions, does not the—do not the junior men then go on the furlough list, as you have described?

A. Yes, they do.

Q. So you have the same process, as I understand it, on a forced reduction because of economic conditions as you have from a forced reduction because of coordination, consolidation or merger?

A. The effect on the individual employes is the same.

Mr. Davis: Thank you very much.

Mr. Mahoney: Your Honor, are there any other questions? I have a few questions on redirect.

Mr. Davis: I think I have one more question.

The Court: All right.

By Mr. Davis (continuing):

Q. If a person goes on a furlough list by virtue of being bumped as a result of merger, then the junior employee [fol. 87] on the furlough list would receive the benefits to which he would be entitled under the New Orleans conditions as presently prescribed by the Interstate Commerce Commission?

A. Yes.

Q. But if he went on the furlough list because of economic conditions, he would receive nothing?

A. That is right.

Mr. Davis: Thank you, sir.

Redirect examination.

By Mr. Mahoney:

Q. Mr. Crotty, Mr. Taylor asked whether you had ever brought up this issue of preservation of employment before. You said you had in the New Orleans case—I mean, excuse me—in the case of the Norfolk & Western and Virginian merger. Now, I am not quite sure it was clear, but Mr. Taylor said that the Commission also imposed the New Orleans conditions.

Now, do you know, from your own knowledge, from reading the Commission's decision or otherwise, to whom or whom the Commission stated in its Order these New Orleans conditions were intended to protect in that connection?

A. If I recall the Commission's Order, the New Orleans conditions that were specified as an alternative were to apply to employes who were not adversely affected as a result of the merger.

[fol. 88] Q. Were they to cover employes who were already covered by the Norfolk & Western agreement or were they to cover employes who were not covered by that agreement?

A. I don't believe I understand your question correctly, Mr. Mahoney.

Q. The situation seems to be this: that the Railroad Brotherhood and the Norfolk & Western and Virginian

agreed by contract to preserve employment as a result of this merger and let attrition take its course?

A. Yes, sir.

Q. Normal attrition. All right. Now, they also—the Commission recognized this agreement, and they also imposed the New Orleans conditions?

A. Yes.

Q. Now, do you know whether they imposed these conditions on top of the Norfolk & Western agreement, or whether they imposed them to protect employes who were not covered by the Norfolk & Western conditions?

A. They imposed them to protect those who were not covered by the so-called Norfolk & Western and Virginian agreement.

Q. Thank you. Now, Mr. Taylor also referred to freezing employment.

Now, is it your position that the interpretation which your organization, the RLEA, has placed on Section 5 (2) (f) means that these jobs, these two thousand jobs that [fol. 89] the railroad in its Exhibit 2-C has stated that it wants to abolish over a period of five years, that they could not abolish those jobs? Is that what that so-called freeze means?

A. That is not a job freeze, as such. Economic conditions could reduce that number to whom the guarantee applied.

Q. Could the attrition rate, as it occurs, also reduce, cut back the number of jobs by two thousand over a period of five years if the carrier wished to do it?

A. Yes, it could.

Q. So that this condition of freeze is really an employment freeze for present employes?

A. It is a starting point.

Q. It would not prevent the railroad from abolishing jobs?

A. No, sir.

Q. Now, Mr. Davis said that the Railway Labor Executives Association and you agreed, had entered into a stipulation agreeing to these New Orleans conditions in a case involving the Erie and DL, at Hoboken, and another one I believe up in Elmira; is that right?

Mr. Davis: Not Hoboken.

By Mr. Mahoney (continuing):

Q. He did not mention the one at Hoboken, but he mentioned the one at Elmira.

Was this activity which took place, this case before the Commission, was that a railroad merger?

[fol. 90] A. No, it was not.

Q. As a matter of fact, have there been, to your knowledge, very many large railroad mergers in the past twenty years?

A. I am just aware of the one that was discussed here today, the Norfolk & Western and Virginian.

Q. Now, Mr. Davis also mentioned to you a number of unions and asked whether or not you knew whether they represented employes of these railroads. Were any of these unions which he mentioned, were any of them, or are any of them, a member through their chief executive of the Railway Labor Executives Association?

A. No, none of them are members of RLEA.

Q. Now, Mr. Davis also indicated that attrition would take care of these employes under the exhibit that he put in, their plan; the attrition rate would take care of them; the attrition rate and the New Orleans conditions. But would the attrition rate and the New Orleans conditions prevent these locations, dislocations of employment, bumping that you described, and so forth?

A. No, they would not.

Mr. Mahoney: I believe that is all. Thank you.

The Court: Any recross?

Mr. Taylor: Yes, your Honor. I would like to ask a question.

[fol. 91] Recross examination.

By Mr. Taylor:

Q. Mr. Crotty, if the whole problem of the changes in the employment situation as a result of merger were not taken care of by this attrition, then under the conditions imposed by the Commission, if various jobs on the railroads are abolished, through abandonments or what have

you, so that for certain employes there is no longer a job for him to go to, under the New Orleans conditions such employes would receive benefits which, in general, would entitle them to the equivalent of the salary they had received on the job, reduced by whatever sum they may earn in some other job that they might subsequently secure; isn't that correct?

A. Insofar as compensation is concerned, that is correct.

Q. It is intended to see that the employee is not hurt in the pay check while making whatever changes are necessary due to the change in his job situation; isn't that correct?

A. You mean the New Orleans conditions, sir?

Q. Yes.

A. Yes, that is the way it has applied.

Q. Now, the conditions that plaintiff would urge that should be applied would require that if certain jobs are abolished as no longer necessary, that, nonetheless, the men who had held those jobs would still be entitled to come to work to be employes, with no job to occupy them during [fol. 92] their tour of duty? Isn't that a likely result?

A. Well, I would hope that the attrition would take care of it, preserve the jobs, and there wouldn't be any men coming to work who wouldn't be needed.

Q. If attrition does not solve the problem, what you would have would be men who had occupied jobs which no longer exist coming to work with no jobs for them to do; isn't that correct?

A. I would have to say that if there was no work for them to do, that would be the result. I feel that 5 (2) (f) requires that their jobs be maintained; their employment be continued.

Q. You say you feel 5 (2) (f) requires the job to be maintained. Just what do you mean by that?

A. That they not be placed in any less favorable position with respect to employment.

Q. By "job being maintained," do you mean that the particular job cannot be abolished for four years?

A. Not the particular job. But the individual should be—as we interpret 5 (2) (f) we feel it requires the car-

rier to continue that individual in his position or in a comparable position until such time as your attrition takes care of what might be an excess number of employes.

Q. But, if you have had a merger involving abandonments of lines and a streamlining of facilities such that duplicating facilities are eliminated, consequently certain [fol. 93] jobs which the duplicating facilities made necessary are also eliminated, then you would have the man coming to work where his job—there was no longer a necessity for that particular job; isn't that so?

A. That, undoubtedly, would be true. What we would hope is that the work would be transferred to some other point and the individual would be permitted to follow his work.

Q. Do you think it would make for good employee morale, or that it would be at all a desirable employer-employee relationship, if the result of a merger would be that a certain number of men had to be permitted to come to work to hold a quote "job" unquote when the job which they had been doing had been eliminated?

Mr. Brand: I object to the question as incompetent, irrelevant and immaterial. If Congress has said something must be done, that is for the Courts to enforce, and that is not the issue here today. What he thinks about what should be done or shouldn't be done isn't important; it is what is the effect of—should the status quo be preserved.

The Court: If what he says isn't important, what has he been doing up here for the last hour and a half?

Mr. Brand: No. No.

The Court: I am under the impression he has been submitted here as an expert, because Mr. Mahoney asked [fol. 94] his opinion.

I will overrule your objection.

Mr. Taylor: Did you understand the question?

A. I understand the question, and I would like to answer it in this way; certainly we are realistic enough to realize that the industry isn't going to employ a lot of people that they have absolutely no use for. And, if I may, I would like to continue just a little bit:

In recognition of this fact, we knew this merger was being contemplated; it has been discussed with our representatives for years; and—I mean over one year, a couple of years. We have even proposed to the Erie management that they would be far-sighted enough here two years ago to recognize that this problem was going to exist if and when this merger come into being, and we tried to discuss with them at that time about an agreement which would provide for attrition to take effect a couple of years ago so we wouldn't be faced with this problem here today. But we were not successful.

Mr. Taylor: I think that is all. Thank you.

The Court: We will take a recess at this time. If you have any further redirect, you may ask him after recess. I have a few other matters to take up at this time.

(A recess was thereupon taken.)

[fol. 95] The Court: All right.

Mr. Mahoney: Your Honor please, we have now the copies of the agreements which the Brotherhood of Maintenance of Way Employes has with the Erie Railroad Company and the Delaware, Lackawanna & Western Railroad Company.

The Court: Do you want to have them marked?

Mr. Mahoney: Yes, sir. We have one agreement between the Delaware, Lackawanna & Western Railroad Company and the Brotherhood of Maintenance of Way Employes.

(A booklet entitled, "Agreement Between The Delaware, Lackawanna & Western Railroad Company and Brotherhood of Maintenance of Way Employes, effective July 14, 1941," was thereupon marked Plaintiff's Exhibit 3 by the reporter.)

Mr. Mahoney: There are three agreements between the Erie Railroad Company and the Brotherhood of Maintenance of Way Employes. One agreement covers crossing watchmen, drawbridge engineers, and drawbridge tenders.

(A booklet entitled, "Agreement Between Erie Railroad Company and the Trustee of the Property of the New

Jersey and New York Railroad Company and the Crossing Watchmen, Drawbridge Engineers, and Drawbridge Tenders Employed Thereon represented by the Brotherhood of Maintenance of Way Employes governing Hours of Serv-
[fol. 96] ice, Working Conditions and Rates of Pay, effective July 1, 1951," was thereupon marked Plaintiff's Exhibit 4 by the reporter.)

Mr. Mahoney: A second agreement between the Erie and the Brotherhood of Maintenance of Way Employes covering bridge structures employes. This agreement, I might state, your Honor, is the only copy we have and, if we may be permitted to do so, we would like to make a copy of it and submit the copy in the record.

The Court: All right.

(A document entitled, "Agreement Between Erie Railroad Company and Department of Structures' Employes represented by Brotherhood of Maintenance of Way Employes, effective February 1, 1946," was thereupon marked Plaintiff's Exhibit 5 by the reporter.)

Mr. Mahoney: And the last agreement is between the Erie and the Brotherhood of Maintenance of Way Employes covering all other maintenance of way employes on that railroad.

(A booklet entitled, "Agreement Between Erie Railroad Company and Trustee of the Property of the New Jersey and New York Railroad Company and the Employes Thereon represented by the Brotherhood of Maintenance of Way Employes governing Hours of Service and Rates of Pay, effective January 1, 1952," was thereupon marked Plaintiff's Exhibit 6 by the reporter.)

[fol. 97] Mr. Davis: Do you intend to furnish us with a copy of these agreements?

Mr. Mahoney: I think the railroads have copies.

Mr. Davis: We don't have them with us.

Mr. Mahoney: We have no other copies of these, and we would be happy to submit them subject to objection, if you have any, to the contents of them.

The last exhibit which I would like to introduce is the so-called New Orleans conditions. It is that portion of the Opinion of the Commission in the New Orleans case which specifies the protection provided for employes in that case.

(A booklet containing the Washington Job Protection Agreement of May, 1936, etc., was thereupon marked Plaintiff's Exhibit 7 by the reporter.)

Mr. Mahoney: I might add, your Honor, the pamphlet which has been marked containing the New Orleans conditions also contains all other types of protective conditions which the Commission imposes in various mergers, abandonment cases, and so forth.

The Court: What exhibit number is that last one?

Mr. Mahoney: 7, your Honor.

The Court: What about the contracts? Does anyone [fol. 98] have any objection to the exhibits—

Mr. Davis: (Interposing) If Mr. Mahoney assures me they are the contracts, I will take his word. I don't have anything to check them against here, but I assume they are the contracts presently in force.

Mr. Mahoney: They are the contracts presently in force.

The Court: They are all admitted.

Mr. Davis: As far as the New Orleans conditions are concerned, I took a quick look at it, your Honor. It contains other statements in there, and it would seem to me that the report of the ICC which lays down the New Orleans conditions contains everything and that this exhibit is surplusage because it does not contain all of the language of the Interstate Commerce Commission.

If it is accepted as a partial quote from the Commission's decision, and we understand that the Commission's decision is controlling, I have no objection to it going in, in this particular form.

Mr. Mahoney: It does not contain the facts of the case, your Honor; it does not contain some of the introductory statement; but it does specifically contain the particular protection which is afforded. That is in that excerpt.

The Court: Does anyone have any objection?

[fol. 99] Mr. Taylor: We have no objection, your Honor, as long as it is, of course, understood that the Commission's

report in the New Orleans Union Passenger Terminal case at 282 ICC 271 is a published official report of the Commission and of the Government, if there is any discrepancy.

The Court: All right.

Mr. Taylor: That is the published report which does contain it.

The Court: With that qualification, it is admitted.

Mr. Mahoney: I believe counsel for the opposition had finished with Mr. Crotty. Is that correct?

I have no questions on redirect, your Honor. If you have any—

The Court: Mr. Crotty, you indicated by your testimony that your union and the other unions that make up the RLEA have changed their attitude in relation to the matter embraced by the statute here under consideration. What are the conditions that brought about that change of attitude insofar as you are concerned, that you have personal knowledge of?

A. Well, the tremendous number of mergers that are now pending or are under discussion, your Honor.

The Court: What do you mean by "tremendous number"?

[fol. 100] A. Well, at the present time mergers are being contemplated, and in some instances applications actually filed for approval in several instances, which I could name if that would be interesting. For example, the—

The Court: (Interposing) No, I don't want any of the names. Just numerically. You say, "a tremendous number," and I am interested in what you mean by "a tremendous number."

A. At the present time, mergers affecting over—affecting approximately four to five hundred thousand railroad employes are under discussion.

The Court: And with plans in contemplation for mergers involving that many employes of railroads, what in your opinion would be the effect of the applications if they were granted; in the event all applications were made and granted?

In other words, how does this particular condition affect your particular group?

A. Insofar as our particular group is concerned, it has been our experience in mergers or consolidations that twenty-five to thirty-five per cent of our people lose their jobs.

The Court: What is your experience in relation to any employee of your group that was working for one railroad that was relieved of his job with any particular [fol. 101] railroad? Does he look for employment with another road?

A. He does, your Honor, but in the last seven to eight years employment in the railroad industry has been reduced by four hundred thousand people, so his chances of finding a job are not very good.

The Court: Then he would have to go out in the open labor market and find employment; is that it?

A. He does, and his particular skills are not adaptable readily to work in the outside labor market.

The Court: I have nothing further.
Mr. Taylor: No further questions.
Mr. Davis: I would like to ask a question.

Recross examination.

By Mr. Davis:

Q. Mr. Crotty, in answer to the Court, you said that four hundred to five hundred thousand employes were involved in mergers under discussion?
A. Yes, sir.
Q. Is that correct?
A. I estimate that is approximately the number.
Q. And you do not know, do you, how many of those mergers under discussion will actually be consummated?
A. I do not.
Q. So what you are saying is that—you are taking a hypothetical situation?
[fol. 102] A. I am.

Q. And the reduction in employment of four hundred thousand employes that you have referred to results from two situations, does it not—from mechanization and from economic conditions?

A. Well, those are two of the factors. There are also others, such as—again I am giving you my opinion.

Q. Yes. But mechanization of track equipment could account for a substantial reduction in employment of track labor, could it not?

A. Yes.

Q. Irrespective of mergers?

A. It is substantial, yes.

Q. Mr. McAfee seemed to think you referred to some prior mergers. What mergers were you referring to?

A. Well, specifically, the merger that we refer to as the New Orleans Passenger case that involved seven railroads operating into the south of New Orleans.

Q. That was a coordination, was it not, sir?

A. Well, if we are drawing a line of difference between a coordination and a merger, yes.

Q. And that was a coordination similar to the coordination which took place at Hoboken, New Jersey, between the Erie and the Lackawanna in the latter part of 1956 and first part of 1957; is that correct?

A. It is similar in principle, although the one in New [fol. 103] Orleans was of greater magnitude.

Q. But the Lackawanna, Erie-Hoboken coordination involved a number of your employes, did it not?

A. Yes, it did.

Q. And in that connection your organization and the Railway Labor Executives Association stipulated the New Orleans conditions, did they not?

A. We did. It was an isolated instance.

Mr. Davis: Thank you very much.

Redirect examination.

By Mr. Mahoney:

Q. If I may clarify one point: you do have knowledge, do you not, Mr. Crotty, of the fact that a number of rail-

roads have announced publicly that they are going to merge? Other railroads have now pending before the Interstate Commerce Commission applications seeking approval of mergers? Is that correct?

A. Yes, that is correct.

Q. With your knowledge on that, would you tell us, in your opinion, how many employes would be affected by those mergers which have already been applied for or which have already been publicly announced; not just a hypothetical thing that might happen?

A. You said, had already been applied for or had been announced?

[fol. 104] Q. Publicly, yes. That they were going to, but maybe they haven't actually filed an application with the Commission.

A. I don't know just what category, Mr. Mahoney, to put mergers that are under discussion, such as the New York Central, B & O, and C & O. I don't know.

Q. Do you know if they have applied?

A. They have not applied.

Q. Has the B & O and C & O applied?

A. Not to my knowledge.

Q. There was also a distinction made between coordinations of facilities and mergers. Now, is the actual—normally, from what you have seen in this case, and what normally happens in the coordination cases, like the New Orleans case to which you referred, is the effect on employes in mergers between two large railroads greater or less than in coordinations?

A. I think the net result is the same.

Q. To the individual.

A. Yes.

Q. But I am talking about numbers of employes. Are there usually more or less affected by mergers of railroads than by a coordination of facilities in particular places?

Mr. Davis: He has answered the question.

A. A lesser number is involved in a merger as opposed to a consolidation, generally. That is the way I interpret [fol. 105] the term. Someone else might disagree with me.

By Mr. Mahoney (continuing):

Q. Would you—I don't quite understand you. There are particular coordinations of facilities in every merger; is that correct? Is that your understanding?

A. Let's take examples, Mr. Mahoney, if you will, please.

Q. All right.

A. For example, the operations, the station activities in a given town, where it previously had two stations, two agents, two baggagemen or staffs, they could be put together; one facility would serve both railroads; and I suppose in your terms that that would be referred to as a consolidation of those two facilities.

Now, I am not a lawyer, and in our everyday language we say that that facility—those facilities were either consolidated or merged.

So I am using the terms synonymously.

Q. When I say "merger," of course I am talking about putting two entire railroads together. When I talk about "consolidation," I am talking about particular facilities of two railroads.

On that basis of definition, would your answer be the same?

Mr. Davis: Just a moment. I think I am going to object. It seems to be Mr. Mahoney is trying to impeach his own witness. He got an answer, and I think his question is fully [fol. 106] answered, your Honor.

Mr. Mahoney: Your Honor, I think it is obviously—

The Court: (Interposing) I don't think he is trying to impeach his own witness. I think he is trying to have the witness' answers clarified for his own edification.

The witness, in my opinion, is unusually frank, and I don't think there is anything that will be brought out here that would in any way be upsetting to anyone.

Mr. Mahoney: I just wanted to clarify the definition as Mr. Crotty and I understand it to make sure we are talking about the same thing when we say "merger" and when we say "consolidation."

A. If you are using the term "merger" as applying to putting together two separate properties, obviously more

people are affected as a result of a merger than they are a consolidation, if the term "consolidation" is limited to individual facilities or properties.

By Mr. Mahoney (continuing):

Q. That was the import of my question.

Now, will you answer me this: does your estimate of five hundred thousand employes that you have mentioned as affected by mergers under discussion include, to your knowledge, any mergers that are merely hypothetical and [fol. 107] haven't been publicly announced as the intent of these railroads?

A. Yes. There are some that have—that are in the talking stage, the discussion stage. There are others, of course, where the applications have been filed.

For example, some of the chief executives met with the presidents of the Northern Pacific, the Great Northern, and the Burlington Railroads here in Chicago the other night to discuss with them their thoughts in connection with a merger or a consolidation of those properties, using your term as a merger.

Q. Thank you. And you would consider that under the classification of "hypothetical" at the moment?

A. Well, no one knows what the net result will be, but they have announced their intention to merge if other obstacles can be overcome.

Mr. Mahoney: I have no more questions. Thank you, your Honor.

The Court: Anything further?

Mr. Taylor: No questions.

The Court: That is all, Mr. Crotty.

(The witness was thereupon excused.)

[fol. 108] Mr. Mahoney: Your Honor, we have no further evidence to introduce, and we would like to ask if the railroads have any; and, if they have not, we would like to be heard in argument.

Mr. Taylor: The Interstate Commerce Commission and the United States have no witnesses to present, nor any evidence to present.

The Court: Any of the other parties in interest?

Mr. Davis: Neither the Erie Railroad or Lackawanna have any witnesses or any evidence to submit. Except the affidavit, I assume, will be considered.

The Court: Yes. That is your affidavit.

Mr. Davis: That is my affidavit, sir.

The Court: All right. Well, you may proceed to your argument.

ARGUMENT BY MR. MAHONEY ON BEHALF OF PLAINTIFF

Mr. Mahoney: If it please the Court, I have a memorandum which I have prepared—(Handing document to the Court and opposing counsel)—on the argument of the Temporary Restraining Order which has in it some of the argument on the merits, which I do not believe are in issue here. It is not argument which the representatives of the ICC and the railroads are unfamiliar with. It is the same type of argument which was presented to the ICC in this merger proceeding before them.

[fol. 109] If the Court please, I think we are—

Mr. McAfee: (Interposing) Your Honor, before we go ahead, could we get the papers straightened out? We seem to have three different types of papers that Mr. Mahoney has handed to us.

(A discussion was thereupon had off the record.)

Mr. Mahoney: If the Court please, we are here today merely to determine whether or not this Court should grant a Temporary Restraining Order pending a hearing on an interlocutory injunction—later, on the merits perhaps—of the petition that the complainants have maintained in this case.

* * * * * * *

[fol. 110] ORAL RULING GRANTING MOTION FOR TEMPORARY RESTRAINING ORDER

The Court: I am going to grant the motion for the temporary restraining order on the basis of testimony adduced by the plaintiff through the person of Mr. Crotty, who is presently President of the Maintenance of Way Employes, and who has held that office for two years, and who held the

office of Assistant President for a period of eight or ten years prior to the two years that he has been President.
[fol. 111] He qualified as an expert. I was impressed with his honesty, his sincerity and frankness, and he appeared to me as a witness that answered honestly the questions that were put to him by the direct examination as well as the cross examination.

He testified that the reimbursement for the moving in the event that an employee is required to move by virtue of the merger only encompasses the original moving; and, if there is a bumping that involves more than one moving, any subsequent moving would not be paid for by the railroad.

He testified that fringe benefits would become inoperative.

He testified that annuity rights might be jeopardized; that employees of ten years or more seniority would probably not be disturbed in their annuity rights, but anybody with less than ten years of seniority would have his account transferred to Social Security.

He testified it would be impossible, in his opinion—and he was speaking as an expert in my opinion—to place the men back in status quo in the event that they were dislocated by virtue of the merger.

And, I find as a fact that those different items add up to irreparable damage when it is testified by the expert that it would be his conclusion that there would be a great possibility that those rights would be lost forever.

[fol. 112] I am conscious of the fact that this merger is an extensive operation, and I am further in possession of information that the plaintiff or the plaintiffs are desirous of having the merger discontinued only in so far as it affects the dislocation of employees who are named here as employees of the plaintiffs.

So, I don't know whether there is a possibility of working out some sort of a stipulation that would permit this merger to continue and, yet, include the restraint that would protect the status quo until the date of the hearing of the three-judge court.

Is there a possibility of that?

* * * * * * *

[fol. 112a] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 113]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

PLAINTIFF'S EXHIBIT 1

STATE OF NEW YORK)
) SS
COUNTY OF BROOME)

LEONARD SERIKO being duly sworn, deposes and says:

1—That he is the General Chairman Erie Susquehanna System Federation Brotherhood of Maintenance of Way Employees. His office is in the Professional Building, 117 Hawley Street, Binghamton, New York and he has held this elective office since October 1952. Prior to his election as General Chairman he was Vice General Chairman for four years and before his election to that office was employed in the Maintenance of Way Department of the Erie Railroad Company from November 1927 to 1958 as a trackman and track foreman.

2—As General Chairman it is his duty to represent employees in the Maintenance of Way Department of the Erie Railroad Company in all matters affecting their wages, working rules and work conditions, and he represents said employees in the presentation of their grievances with the management of the Erie.

3—He is familiar with the complaint filed by the Brotherhood of Maintenance of Way Employees against the United States and the Interstate Commerce Commission in the United States District Court in Detroit, Michigan to restrain the operation of the order entered by the Interstate Commerce Commission approving the merger of the Erie Railroad Company and the Delaware, Lackawanna and Western Railroad Company until such time as said order

is conditioned in accordance with the requirements of Section 5(2)(f) of the Interstate Commerce Act.

4—That the facts herein stated are based upon personal knowledge of exhibits submitted by the Erie and the Delaware, Lackawanna and Western to the Interstate Commerce Commission in the proceeding designated Finance Docket No. 20707 and the Railroads' testimony offered in support [fol. 114] thereof; conferences with management officials of the Erie and the Delaware, Lackawanna & Western as to their plans for their Maintenance of Way forces after the merger becomes effective; collective bargaining agreements governing the rights of both railroad managements and their employees in the Maintenance of Way Departments; and the existing seniority rosters of employees which evidence each employee's seniority rights in the event of job vacancies due to transfer of work, death, retirement, dismissal or resignation of employees or abolishment of jobs.

5—Upon the effective date of the merger the Erie and the Delaware, Lackawanna and Western will make certain changes in work assignments and work forces and will reconstitute certain seniority districts which will bring into play the seniority rights of the employees in the Maintenance of Way Departments of both railroads.

6—The specific changes to be made and the date of the changes have not been made known by the Erie and the DL & W managements, however, on October 17, 1960, those managements will be authorized to make any changes they deem necessary to effectuate the merger and conferences with those managements indicate that many such changes will take place immediately.

7—Under the provisions of the Interstate Commerce Commission order dated September 13, 1960 and issued on September 15, 1960 the Erie-Lackawanna, as the merged railroads will be known, will be able to abolish any and all jobs they deem necessary to effectuate the merger and the employees who are deprived of employment as a result of such job abolishments will be entitled to certain monetary allowances. Once the jobs are abolished however, and the senior employees exercise their seniority rights to secure

the positions of the employees with seniority rights junior to them with resultant transfers, lay-offs, etc., it will be a [fol. 115] practical impossibility, should the Court sustain the complaint of the Brotherhood of Maintenance of Way Employees to "turn back the clock" and recreate the abolished jobs, move employees whose transfer were caused by those abolishments and thereby so restore the present status quo as to comply with the mandate of Section 5(2)(f). Attempts at such restoration could not be successful and would cause additional expense to the Erie-Lackawanna Management.

8—The result of such a situation would irreparably injure the employees involved because they would be deprived permanently of employment with the Erie-Lackawanna Railroad. Other employees would be transferred and the retransfer of such employees throughout the Erie-Lackawanna system would cause great and irreparable injury to them.

9—The Erie and the Delaware, Lackawanna & Western managements have testified that 600% more jobs will be created by natural attrition and will be abolished because of the merger and therefore no hardship should result to the Erie-Lackawanna as a result of the imposition of the employment protective conditions required by Section 5 (2)(f). For example, the railroad management testified that during the first year following the effective date of the merger 2,507 will be created by attrition while 403 will be abolished.

10—However, if the conditions required by Section 5 (2)(f) are not imposed many employees entitled to be retained in their employment will be forever deprived of that employment.

11—The railroad managements have testified that they intend to effect numerous abandonments of lines of railroad after October 17, 1960 and also shift certain freight traffic from the lines of the DL & W to those of the Erie. The result of any of these abandonments and shifts of traffic will be a lessening of work for Maintenance of Way

[fol. 116] employees, abolishment of many jobs, and the transfer of other jobs. The employees affected will exercise their seniority rights and displace junior employees at other points. These employees in turn will displace employees junior to them and so on until those employees at the bottom of the seniority rosters will be deprived of employment. Such exercise of seniority rights will result in transfers of employees from one point to another and finally in the deprivation of the employment of the youngest employees. Should the Court uphold the complaint of the Brotherhood of Maintenance of Way Employees and enforce the requirements of Section 5(2)(f) the employees who had been deprived of their employment would have to be re-employed, all seniority rights readjusted, employees re-transferred and job abolishments take place through natural attrition.

FURTHER deponent sayeth not.

/s/ LEONARD SERINO

Sworn to before me this
8th day of October, 1960.

/s/ JOHN S. GRANATA

JOHN S. GRANATA
Notary Public, State of New York
Residing in Broome County
Broome County Clerk's No.
My commission expires March 30, 1961

[fol. 116a]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

PLAINTIFF'S EXHIBIT 2

ERIE RAILROAD COMPANY

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY

REPORT ON

ECONOMICS OF PROPOSED MERGER

WYER, DICK & CO.

UPPER MONTCLAIR, NEW JERSEY

AUGUST 6, 1959

[fol. 117]

PLAINTIFF'S EXHIBIT 2-A

STUDY I

ERIE - LACKAWANNA MERGER STUDY

Common Points

The Erie and Lackawanna in general parallel each other from east to west beginning at Hoboken-Jersey City in the east to Buffalo in the west. At some points they serve the same large terminals, and in other cases their lines cross or meet at smaller outlying stations. With separate operation of the two companies as at present, services are usually performed at these so-called "common points" by two separate operating organizations except, of course, at points where coordination has already been achieved.

The purpose of Study I was to review the operations at all common points, and estimate the potential savings from merger as a result of serving each point with one unified operating organization.

At several locations particularly at Hoboken and Binghamton to Gibson inclusive, certain services are now being performed by unified forces or are contemplated under coordination prior to merger. The Erie and Lackawanna common points from Coopers to Wayland inclusive are included in Study II, Line 5. There remained 13 common points at which merger would result in substantial savings which are summarized for each point in the statement attached as Schedule A, and their location is shown on System Map No. 1.

In order to estimate potential savings from merger the following procedure was used:

Maps were prepared for each common point showing the tracks and important facilities of the roads included in the merger, together with the names and locations of all industries served by private trackage. Statements were also prepared showing the operating data at each point, generally for the year 1956, the latest twelve month period available when the studies were started. These statements covered switching operations, both by yard engines and by road engines doing station switching at the smaller stations. They also covered passenger stations, freight stations, enginehouses, car repair tracks, yard inspection, and miscellaneous operations. A complete statement of forces employed under existing operations, together with their rates of pay, was included. In addition, supplemental information in even greater detail, including time of arrival and departure of trains, cars handled, and cars interchanged, was secured for four of the most important points: Buffalo, Binghamton, Scranton-Avoca, and Hoboken-Jersey City.

Field parties equipped with the data mentioned above were then sent to each common point for the purpose of inspecting the facilities involved, determining which facilities should be retained for use by the consolidated company and which might be retired or released for sale or rental. They also estimated the forces which would be needed for merged operation as compared with the total forces now required for separate operation and developed plans for new yards and facilities where such would be required.

In all cases field parties consisted of representatives of Wyer, Dick & Co. and local officers of the railroads serving each point. The most important common points were inspected by the Steering Committee, including Buffalo, Binghamton, Scranton-Avoca area and Hoboken-Jersey City. Recommendations of the field inspection parties, approved or modified by the Steering Committee if the latter did not participate in the inspection, were then incorporated in a so-called "field report" describing the changes. The engineering departments then prepared estimates of the salvage to be recovered from property retired, the estimated cost of new construction and normalized maintenance of facilities to be abandoned or constructed, and the accounting departments calculated the savings in operation and summarized the figures for each common point. It is from these accounting department summaries that the figures shown on Schedule A for each of the 13 common points are drawn.

The total annual savings at the 13 common points, as summarized on Schedule A, prior to the cost of capital required, are estimated at $5,179,876. The saving, in part, is based upon the estimated abolition of 395 jobs, and it is expected that merger would reduce yard engine operations by 205 shifts per week. A total of 17 yard diesels and six road switchers would be released and savings resulting from release of locomotives are computed in Study VII-L.

Extensive new construction costing $10,178,643 would be required at Buffalo, Binghamton, Scranton-Avoca, and the New Jersey Terminal area in order to realize the estimated savings from merger. Total cost of new construction for all 13 points is estimated at $10,215,999, but this is offset somewhat by (1) salvage of $5,120,494 and (2) non-recurring income tax savings of $2,151,468 related to property changes, and increased by (3) $551,793 because of the cost of relocating certain property. The total net cash cost of making the property changes recommended is estimated at $3,455,830. Interest at 5% per annum on this amount totaling $172,791 is deducted as an increased expense required in merging the properties, and the total estimated net saving after this deduction is $5,007,085. To put it another way, the annual operating saving of $5,179,876 represents a 150% return on the net cost of merging operations at common points.

Buffalo

The principal line of the Lackawanna enters the Buffalo area from the east at East Buffalo and continues to the passenger station at Buffalo. The Lackawanna also has a double track freight line from East Buffalo to Black Rock over which the Pennsylvania and Chesapeake and Ohio Railroads have trackage rights.

The Erie has three lines entering Buffalo. The line from Hornell enters from the east at East Buffalo and this line closely parallels the Lackawanna from Depew to East Buffalo. The line from Jamestown enters from the south over trackage of the Buffalo Creek Railroad, and the Niagara Falls branch from Suspension Bridge and Black Rock enters from the north at East Buffalo. The Chesapeake and Ohio has trackage rights over the latter line between Suspension Bridge and East Buffalo and the Wabash has trackage rights between Black Rock and Smith Street, Buffalo.

The lines described are shown on Map No. 1 included in the map envelope accompanying this report, and a much larger scale map of the Buffalo area is included as No. I-A. The latter shows the principal tracks and facilities of the two roads in color, together with proposed abandonments and new construction.

The principal freight yard of the Lackawanna, comprised of an eastbound yard and a westbound yard separated by the present main lines, is at East Buffalo; and the principal freight yard of the Erie, comprised of six small yards known as Canada, Old BSW, JX, Eastbound Receiving, Eastbound Departure and North Yards, is located immediately west of the Lackawanna freight yard. Both lines have numerous other tracks and small holding yards throughout the Buffalo area required for interchanging cars with other railroads and serving industries.

Through freight trains and all passenger trains will use the Erie line between East Buffalo and Corning. The principal freight yard of the merged company would be located at East Buffalo on the Lackawanna where company owned land is available for expansion and where the least amount of new construction would be required. All freight trains and transfers would originate and terminate in this yard.

The present Lackawanna yard could not handle the combined traffic of the two roads, and it is proposed to build a new modern electronic hump retarder yard at that point. This yard would be located between the present Erie and Lackawanna main lines, and the major portion of the new trackage would be located east of the present Lackawanna eastbound yard. This would permit completion of about 80% of the proposed facility without disturbance of present Lackawanna operations and no disturbance to the present Erie operations.

The proposed classification yard would consist of 44 tracks in four groups of nine tracks and one group of eight tracks with five long tracks of 125 car capacity. Transfers to Black Rock and the various switching areas, interchanges throughout the terminal and all freight trains would leave directly from the classification yard. Buffalo would be reclassified from a regular icing station to an emergency icing station, and the most southerly track in the classification yard would be designated as an icing track. Icing would be performed by mobile truck, and cars of perisnable traffic would then be flat switched or re-humped to the proper track.

The westbound receiving yard would be to the east of the classification yard and parallel to the present Lackawanna main tracks and would be so located to permit hump engines to push directly from the receiving yard over the hump. The westbound receiving yard would have seven tracks, the longest being of 160 car capacity.

Twenty-five tracks of the present Lackawanna westbound yard directly to the north of the proposed hump classification yard would be used as a receiving yard for freight trains from Jamestown and Suspension Bridge and for all transfers and industrial engines. The coal yard consisting of thirteen short tracks directly to the north of the westbound yard would be used for cleaning and storage of cars.

STUDY [fol. 120]

That portion of the Erie principal yard known as Canada Yard would be used as a base yard for industry cars for the Erie Ferry Street, Babcock Street, Hamburg Street, Lousiana Street and Niagara Frontier Food Terminal industrial districts and for storage of hold grain. The Lackawanna Abbott Road yard would remain unchanged and serve the adjacent industrial area.

Transfers would be operated between East Buffalo and Black Rock and because of the location of the proposed main yard of the merged company it is proposed to use the Lackawanna line from East Buffalo to Delavan Avenue as indicated in Study II, Line No. 6. This will also greatly relieve the congestion in the heavy industrial district between William Street and Delavan Avenue on the Erie Niagara Falls branch.

Passenger trains would be rerouted from the Erie line to the Lackawanna line at William Street, East Buffalo, and through freight trains would be rerouted from the Erie line to the Lackawanna line at Depew. New remote controlled connections would be provided at both locations. This provides for the operation of passenger trains along the southerly edge of the proposed yard instead of through the middle of the Lackawanna yard as at present.

All road engines, and switch engines working in the area, would be serviced at the Erie enginehouse at East Buffalo and additional diesel fuel storage would be provided by relocating the Lackawanna 400,000 gallon diesel fuel tank. Switch engines at Black Rock would be serviced from existing facilities or by truck and would return to East Buffalo for emergency repairs and monthly inspections.

The only freight car repair track in the Buffalo area would be at the present Lackawanna shop at East Buffalo. Only running repairs would be made at this location, and the present Lackawanna repair building and trackage would be modified to provide for progressive repairs.

Two piggyback loading and unloading tracks would be located adjacent and parallel to the leads at the west end of the present Lackawanna westbound yard.

The Lackawanna freighthouse would be used for all LCL freight and the Erie office building would be used for the station agency and clerical force.

With the concentration of freight yard operations and facilities described above, the following major abandonments become possible:

Erie

East Buffalo - JX Yard: entire yard and buildings

Old BSW Yard: entire yard and buildings

Eastbound Departure Yard: entire yard and buildings

Eastbound Receiving Yard: entire yard and buildings

North Yard: entire yard

Repair Yard: entire yard and buildings

IQ Tower: building and interlocking plant

Buffalo - Lousiana Street: freight house, nine tracks, gantry crane and truck scale.

Lackawanna

East Buffalo - Eastbound Yard: entire yard, interlocking plant, interchange tracks, eastbound car repair tracks, icing facility, covered stock pens and other related buildings.

Enginehouse: all tracks except two, enginehouse office building, portion of enginehouse, turntable, sanding and fueling facilities, small fuel storage tanks.

Repair Yard: track scale

After the proposed plan of operation for the entire terminal and facilities required had been developed, the effect of these facilities on existing operations was analyzed.

Many examples of duplication and wasted effort as a result of separate operation were observed by the Committee during its inspection of the terminal, but one may be cited here. Both lines operate transfers to the same interchange points with other railroads and between East Buffalo and Black Rock. Except on weekends, the Lackawanna operates eighteen and the Erie operates twelve transfer assignments per day. It is estimated that the merged company would operate twenty-two assignments or a saving of eight assignments per day.

The final step in the analysis was to set up the proposed switch engine and transfer tricks, supervisory forces, and employees which it is estimated would be required to operate the merged terminal, compare them with existing forces and estimate the savings.

The estimated savings in switch engine and transfer shifts may be summarized as follows:

Switch Engine Shifts	No. of Shifts Worked Classified According to Days Worked Per Week											
	Erie			DL&W			Total			Merged Company		
	7	6	5	7	6	5	7	6	5	7	6	5
East Buffalo	11	-	1	13	-	2	24	-	3	14	1	-
NFFT	2	1	-	-	-	-	2	1	-	2	1	-
Hamburg Street	-	1	-	-	-	-	-	1	-	-	1	-
Lousiana Street	1	1	-	-	-	-	1	1	-	1	1	-
Babcock Street	3	-	-	-	-	-	3	-	-	3	-	-
Coal Yard	-	-	-	3	-	-	3	-	-	-	-	1
Shop Yard	-	-	-	1	-	1	1	-	1	-	-	2
Abbott Road	-	-	-	3	-	-	3	-	-	3	-	-
City	-	-	-	1	2	-	1	2	-	1	2	-
Columbia Street	-	-	-	1	2	-	1	2	-	1	2	-
Transfers	9	-	3	11	7	-	20	7	3	15	6	1
Totals	26	3	4	33	11	3	59	14	7	40	14	4

Estimated Decrease in Switch Engine and Transfer Shifts

7-day shifts	19
5-day shifts	3

The Erie yard has three antiquated rider humps and of the twenty-four, seven-day assignments eliminated, one operates with a twelve-man ground crew in addition to the engine crew, one with an eleven-man crew, one with a ten-man crew, one with an eight-man crew, one with a seven-man crew, one with a six-man crew and one with a five-man crew. One of the five-day assignments operates with a four-man crew.

The above reduction in switch engine shifts and transfers represents the elimination of about 136 jobs daily. The aggregate saving is $1,803,556 per year and the release of ten diesel yard locomotives for other service would result.

As to forces employed in yard offices, freight stations, etc., the statement below summarizes estimated net reductions or additions in jobs which would result from merger.

The net changes in jobs are shown, regardless of whether they are assigned to work five, six or seven days per week. The number of employees involved would be slighly greater because of the relief men required to handle the 6th and 7th day assignments.

[fol.·123]

	Net Number of Jobs Abolished
Yard Forces	27
Freight Stations	10
Enginehouses	22
Car Inspectors	46
Freight Car Repair Tracks	20
Miscellaneous	4 (Added)
Total	121

Total estimated savings in non-operating labor in the Buffalo study are $736,642, which is included in the total savings from all sources of $2,007,340 per year. Total net cash required, mostly for construction of the new hump yard, is estimated at $4,075,681, and after interest on this amount at 5% is deducted, net savings are shown as $1,803,556.

In a sense, the proposal to spend over $4,000,000 for a yard at Buffalo may not seem consistent with Studies V and XIII where it is estimated the merged company would experience a total of about $12,000,000 of revenue lost or diverted from the Buffalo Gateway.

It is suggested that in the event of merger the order of procedure would be to concentrate on Hornell and when changes have been completed there, it would then be possible to gauge more accurately the movement of traffic through Buffalo. It may well be that announcement of plans to provide a modern yard at Buffalo as early as possible after merger will be a powerful deterrent to diversion of traffic through solicitation by the western connections.

If business is diverted as anticipated, the expenditure at Buffalo may not be necessary in large part, but on the other hand if spent it may prevent a substantial loss of traffic to other lines.

In any event, the form in which these studies are presented represents, in our opinion, the maximum potential loss and greatest foreseeable expenditure at Buffalo. Final results may show some modification of one or both.

Binghamton

The Erie and Lackawanna main lines from Hoboken-Jersey City converge at Great Bend and Hallstead about fourteen miles east of Binghamton and parallel each other on opposite banks of the Susquehanna River to a point about two miles east of Binghamton where the two rights of way adjoin each other and remain parallel westward through the city. The Lackawanna also has a branch line northward from Binghamton to Chenango Forks from which point separate lines run to Syracuse and Utica.

STUDY I [fol. 124]

The Lackawanna East Binghamton yard would be the main yard for the merged company in the Binghamton area. This yard would combine traffic to and from the east and to and from Scranton with D&H interchange traffic and would also serve as a distribution point for empty equipment for the territory.

The three present receiving and departure tracks would be lengthened to a capacity of about 150 cars which in turn would require other minor track revisions. A new freight car cleaning track would be provided and the switching lead at the east end of the yard would be lengthened.

West of Binghamton the Erie and Lackawanna will be coordinated prior to merger and the freight stations are now coordinated. The merged company would use the same freight and passenger station as under coordination.

The present Lackawanna enginehouse and car department facilities at East Binghamton would be used.

Under the plan of operation described above the following major abandonments become possible: all except six tracks in the Erie Binghamton yard, Erie mechanical facilities, four tracks in the DL&W "YO" yard and the Erie line between Binghamton and Great Bend as proposed in Study II, Line No. 4.

As a result of the above changes, 18 switch engine tricks per week, four yard force positions, four enginehouse positions, and two car inspectors would be eliminated and one yard diesel locomotive would be released. Four positions would be added for car cleaning. The net cash cost is estimated at $15,403 and the estimated net annual saving from all sources is $190,533 including 5% interest on the net cash cost.

Scranton-Avoca

The Lackawanna main line is an east-west line passing through the area at Scranton at which point major yards and system heavy repair facilities for locomotives and cars are located. The Lackawanna also has a north-south branch line from Scranton to Northumberland known as the "Bloomsburg Branch" which serves the territory on the west side of the Lackawanna and Susquehanna Rivers including Taylor, Kingston and Plymouth.

The Erie branch line from Lackawaxen enters the territory at Rock Jct. and terminates at Plains Jct., serving the area east of the Lackawanna and Susquehanna Rivers including Dunmore, Scranton, Avoca and Pittston. Secondary branch lines serve the territory from Rock Jct. to Jessup and from Hillside Jct. to Plains.

Main freight yards are at Avoca on the Erie and Taylor and Scranton on the Lackawanna. The Lackawanna also has a large retarder yard on the Keyser Valley Branch known as Hampton Yard which is not in use except for storage of cars.

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In addition to the above, both lines have numerous mine spurs, industry tracks, and small yards throughout the entire area. The lines described above are shown on Map No. I-B and this map also indicates trackage rights for all lines in this territory.

The plan of operation for this area was based upon abandonment of the Erie line between Hillside Jct. and Hawley as proposed in Study II, and use of the Erie line as the main freight route between Hoboken-Jersey City and Great Bend as proposed in Study IV.

The Lackawanna Taylor yard would be the main freight yard for the entire area and Scranton yard would be used mainly as an industrial supporting yard. A segment of the Erie Old Forge Branch would be restored connecting with the Lackawanna Bloomsburg Branch at Old Forge to provide access to the Erie Avoca, Pittston, Plains and Plains Jct. areas. Access to Erie mines and industries north of Dickson City would be via the present Lackawanna route.

Interchange with the CNJ would be at Taylor, with the Lehigh Valley at Pittston Jct. and with the D&H at Scranton.

The Lackawanna diesel shop and freight house at Scranton would be used and the Lackawanna freight repair track would be moved to Taylor yard.

With the concentration of freight operations in the manner described, the following major abandonments shown on Map I-B become possible:

Erie

Scranton: two freight house tracks and freight house.

Dunmore: four yard tracks, one freight house track, freight house, engine house and related trackage, and track scale.

Avoca: bulk of yard, enginehouse and related trackage, car repair facility and track scale.

DL&W

Scranton: car repair facility and trackage.

In addition, the following lines in this territory which are also shown on Map No. I-B would be abandoned and are included in Study II:

Line No. 1: Erie line Hillside Jct. to Hawley

Line No. 2: Erie line Rock Jct. to Gypsy Grove

Line No. 3: Erie line Dunmore to East Jct.

In addition to switch engine savings resulting from consolidation of operations this area would realize savings due to rerouting of through traffic over the Erie line east of Hallstead and it is estimated that 60 switch engine shifts per week would be eliminated which may be summarized as follows:

Location	Switch Engine Shifts Per Week			
	Erie	DL&W	Merged Company	Net Decrease
Scranton-Taylor	-	205	163	42
Avoca	18	-	5	13
Dunmore	10	-	5	5
Total	28	205	173	60

Rearrangement of mine runs would result in estimated annual savings of $33,845. The reduction in yard and road service would also release two diesel yard and six road switcher locomotives for other service, which includes three Erie road units now operating on the Avoca-Ashley turn and two Lackawanna helper units.

The statement below summarizes estimated net reduction in non-operating jobs which would result from merger.

	Net Number of Jobs Abolished
Freight Station	3
Yard Forces	12
Enginehouses	22
Freight Car Repair and Inspection	31
Miscellaneous	2
	70

Total estimated savings in non-operating labor are $375,651, which are included in total savings from all sources of $905,401 per year. Total net cash required is estimated at $63,482 and after interest on this amount at 5% is deducted, net savings are shown as $902,227.

Of the $507,611 required for new construction, approximately $263,000 represents the cost of restoring a portion of the Erie Old Forge Branch. Due to mine flood damage in the Pittston area, it may be that the level of business on the Erie lines south of Avoca would not warrant the new construction. The Avoca area could be reached via Pittston Jct. and the Lehigh Valley over which the Erie now has trackage rights and it is recommended that this alternative be investigated prior to construction of the proposed extension.

Hoboken-Jersey City

The Erie main line reaches Jersey City via Ridgewood, Rutherford and Croxton. At Croxton the line divides into a single track tunnel line used for freight only and a single track archway line used for both freight and passenger, which lines again converge at Jersey City. A branch line extends from the east end of the tunnel to Weehawken. The Erie Northern and Greenwood Lake Branches enter the main line in the vicinity of Croxton. The Newark Branch enters the Greenwood Lake Branch about one mile west of Croxton.

The Lackawanna Boonton Branch enters Hoboken via Clifton, Passaic, Kingsland, and Secaucus, and this line is joined by the Morris and Essex Branch from Summit at Bergen Jct. The Lackawanna also has a branch line used for freight only from Kingsland on the Boonton Branch to Harrison on the Morris and Essex Branch.

The main freight yard of the Erie is at Croxton with principal supporting yards at Jersey City and Weehawken. At present all through freight trains originate and terminate at Croxton and transfers handle all traffic between this point and the supporting yards. All Erie lighterage is handled at Weehawken except for a small portion of covered lighterage which is handled at Jersey City Pier 8. All car float traffic is handled at Jersey City.

The Lackawanna main yard is at Hoboken and principal supporting yards are at Secaucus and Harrison. Through freight trains originate and terminate at Hoboken and pick ups or set outs are made at Secaucus. All Lackawanna lighterage operations are concentrated at Hoboken.

The lines and facilities described above comprise the New Jersey Terminal Area and are shown in detail on Map No. I-C included in the envelope.

Passenger operations are for the most part already coordinated in the Lackawanna station at Hoboken, and for the purpose of this study it was assumed all passenger service would be coordinated and the Erie passenger facilities at Jersey City would be abandoned prior to merger.

In order to settle on a terminal plan for this area it was first necessary to determine the main line which would be used for handling through freight to and from Binghamton and the west. This question was analyzed in Study IV where it was determined the Erie line would be used.

It was also necessary to determine the water front railhead facilities which would be used. A special day by day car and tonnage study was made for December, 1956, which was the heaviest month on both lines during the year, and based thereon we believe the Lackawanna facilities would be used for all open lighterage, with the area now occupied by the Lackawanna float bridges converted to facilities for storage and handling of open lighterage.

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Erie Pier 8 would be used for all westbound and certain selected eastbound covered lighterage. Lackawanna Piers 3, 4, 7 and 9 would be used for the balance of eastbound covered lighterage. Lackawanna Piers 5 and 6 would be used for all coal, grain and cement.

All car float traffic would be handled at the Erie facility. Two modern electric float bridges would be added just south of the present bridges, and a supporting yard for the additional float bridges would be constructed on the site of the present passenger station trackage and passenger car yard at Jersey City. The Erie truck-in-lieu of lighterage facility at Jersey City would be used and would be expanded.

This plan not only concentrates all marine freight operations at one central location allowing for greater efficiency in tug operations, but also eliminates towing to and from Weehawken resulting in substantial savings included in Study VII-M. Additional advantages are as follows:

Based on the above, Erie Croxton Yard would be the main outer yard for the merged company and most of the crews in through freight, local freight, transfer and yard service would originate and terminate at that point. Two new connections are proposed at the intersection of the Erie Greenwood Lake Branch and the Lackawanna Harrison-Kingsland Branch to facilitate movements between Croxton Yard and Harrison and between Croxton Yard and the Lackawanna Boonton Branch. One train per day handling car float and industrial traffic for Jersey City from the west would be classified west of Croxton and would operate direct to Jersey City without break up at Croxton and one westbound forwarder train would also be made up and depart from Jersey City. Two tracks would be replaced on the Erie archway line east of Palisade Avenue and connect with present yard tracks at Jersey City to serve as long receiving and departure tracks.

Coal trains from Scranton would operate direct to Hoboken, and empty hopper trains would operate out of Hoboken.

Harrison Yard would remain unchanged and would serve as a base yard for industries in that territory and for local way freight crews. Monmouth Street Yard would also remain unchanged and would continue to be used for storage of commuter passenger equipment during daytime layover.

The Erie piggyback facility at Croxton would be used and the Lackawanna facility would be converted to much needed team track area.

Weehawken yard would be reduced to a yard handling interchange and local industrial business. Pier H would be retained for handling iron ore from boat to car. A shell-type building would be constructed on the present site of the Bowery Yard for the handling of set-up automobiles for export now handled at Erie Pier D.

The Lackawanna float bridge at 11th Street, Hoboken, would be retained for handling General Foods business.

The Lackawanna freight house at Hoboken would be used and the Erie freight house at Jersey City would be leased.

The Erie enginehouse facilities at Jersey City and Croxton and the Lackawanna enginehouse at Hoboken would be retained.

The Erie car repair track at Croxton would be expanded and would serve the entire terminal.

All perishable protective service would be handled at Croxton and Jersey City.

As a result of the above changes in the manner described, the following major abandonments become possible:

Erie

Weehawken: all of present Bowery Yard, storehouse and crane shop. Annex "A", Piers A, B, C, D and F and all adjacent land and related trackage outlined in yellow shown on the insert of Map No. I-C would be available for sale or lease.

Jersey City: all passenger station and passenger yard trackage and facilities which will not be retired under coordination but which would be necessary to accomplish the proposed track changes for the supporting yard for the new car float bridges. Grove Street interlocking would be retired, but the tower and remote control interlocker would be retained.

DLAW

Hoboken: all float bridges, portion of float yard trackage, east end of four yard tracks, car repair track and facilities, Henderson Street enginehouse tracks and turntable, west end of freight house tracks, icing facility, float yard track scale, and piggyback facility.

Secaucus: bulk of yard, track scale, all repair tracks and facilities, runaround track, running track from Secaucus to Erie Greenwood Lake connection, portion of DLAW-PRR interchange track at West End, yard office and portion of interlockings at West End Tower and Hackensack River Bridge.

The net change in switch engine shifts and transfers may be summarized as follows:

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No. of Shifts Worked Classified According to Days Worked Per Week

	Erie			DL&W			Total			Merged Company		
	7	6	5	7	6	5	7	6	5	7	6	5
Weehawken	1	2	2	-	-	-	1	2	2	-	2	1
Jersey City	4	4	7	-	-	-	4	4	7	6	7	8
Hoboken	-	-	-	8	6	9	8	6	9	1	8	3
Croxton	7	6	5	-	-	-	7	6	5	13	9	3
Secaucus	-	-	-	2	-	1	2	-	1	-	-	-
Transfers	6	-	-	3	-	1	9	-	1	3	6	-
Totals	18	12	14	13	6	11	31	18	25	23	32	15

Estimated Increase/Decrease

7-day shifts - D	8
6-day shifts - I	14
5-day shifts - D	10

The above summary represents the elimination of 22 switch engine shifts per week. However, 14 car rider positions would be added at Croxton. Two yard diesel locomotives would be released.

The statement below summarizes estimated net reductions in non-operating jobs which would result from merger:

	Net Number of Jobs Abolished
Yard Forces	14
Pier and Lighterage	48
Freight Station	30
Station Bureau	10
Enginehouse	6
Car Inspectors	21
Car Repair Track	18
Miscellaneous	13
Total	160

Total estimated savings in non-operating labor are $965,425, which is included in the saving from all sources of $1,578,403. Total net cash realized is estimated at $123,551, and after interest on this amount at 5% is added, net savings are shown as $1,584,581.

The total estimated cost of new construction is $3,273,276 most of which represents new construction at Jersey City, Hoboken and Weehawken but this amount is more than offset by (1) salvage from property retired, (2) non-recurring income tax saving and (3) extraordinary expense which would be eliminated as a result of merger detailed in Column 12 of Schedule A.

Other Common Points

The same procedure was used to determine necessary changes and estimate the net savings of the other nine Common Points shown on Schedule A.

ERIE - LACKAWANNA MERGER STUDY
Common Points
Summary of Net Cash Required and Estimated Savings

STULY 1
Schedule A

	1 Black Rock	2 Buffalo	3 Lancaster and Depew	4 Corning	5 Binghamton	6 Scranton-Avoca	7 Mountain View	8 Little Falls	9 Paterson	10 Passaic	11 Newark-Harrison-Kearny	12 Hoboken-Jersey City	13 N. Y. City Frt. Stations	Total - All Points
A. Net Cash Required For or Realized From Merger														
1. Salvage from Property Retired	$ 49,530	$1,443,960	$46,856	$221,981	$124,393	$225,410	$1,400 L	$ 85	$24,911 G	$ ---	$ 58 G	$4,884,710 G	$ ---	$ 5,120,494 G
2. Extraordinary Expenditures Next Four Years	---	---	---	---	---	---	---	---	---	---	---	40,000 G	---	40,000 G
3. Property Acquired	9,994 L	6,698,823 L	5,119 L	9,648 L	188,933 L	507,611 L	800 L	---	---	---	---	---	---	10,215,999 L
4. Cost of Relocating Property	10,872 L	66,848 L	7,404 L	9,420 L	20,743 L	7,504 L	---	---	4,376 L	---	850 L	3,278,276 L	---	551,793 L
5. Non-Recurring Income Tax Saving	45,072	755,739	45,626	195,174	69,380	226,223	1,757	1,741	11,690 G	---	1,633 G	707,643 G	---	2,151,468 G
6. Total Net Cash Required For or Realized from Merger	$73,736	$4,075,881 L	$82,958	$398,087	$15,403 L	$63,482 L	$ 443 L	$1,826 G	$18,280 G	---	$ 741 G	$ 125,551 G	---	$ 3,458,830 L
B. Revenues														
1. Freight Service	---	$ ---	---	---	$---	$ ---	---	---	$ ---	---	$ ---	$1,301 L	$ ---	$ 1,301 L
2. Miscellaneous	---	17,048 L	---	---	8,490 L	651 L	---	---	1,000	---	3,250	4,480	3,350	14,109 L
3. Total Revenues	---	$17,048 L	---	---	$8,490 L	$ 651 L	---	---	$ 1,000	---	$3,250	$3,179	$3,350	$ 15,410 L
C. Expenses														
Maintenance of Way and Structures														
1. Normalized Maintenance	$10,719	$12,337	$17,107	$ 3,277	$28,581	$28,470	$ 259	$ 414	$ 3,651	---	$ 513	$286,731	---	$ 444,059
2. Depreciation	1,223	23,799 L	3,504	13,716	8,436	16,156	556	514	1,252	---	557	268,093	---	290,218
3. Total Maintenance of Way and Structures	$11,942	$11,462 L	$20,611	$ 16,993	$37,017	$44,626	$ 815	$ 928	$ 4,903	---	$1,070	$554,824	---	$ 734,277
Station Expenses														
4. Combination	---	$ ---	$5,671	$ ---	---	$ ---	$4,570	$4,750	$ ---	$ ---	$ ---	$ ---	$ ---	$ 14,991
5. Freight	---	56,075	---	4,462	---	16,512	---	---	10,927	$15,828	12,670	461,143	114,301	691,718
6. Passenger	---	---	---	8,792	---	---	---	---	---	---	---	---	---	8,792
7. Total Station Expenses	---	$56,075	$5,671	$13,254	---	$16,512	$4,570	$4,750	$10,927	$15,828	$12,670	$461,143	$114,301	$ 715,501
Other Operating Expenses														
8. Yard Switching	$118,568	$1,098,711	$ ---	$ 14,589 L	$105,214	$347,945	---	---	$ ---	---	$ ---	$ 32,710	---	$ 1,686,559
9. Train Switching	---	---	13,735	---	---	33,845	---	---	1,032	---	---	---	---	48,612
10. Yard Transportation Forces	27,511	186,572	---	---	23,362	68,730	---	---	---	---	12,867 L	82,777	---	376,085
11. Enginehouses	---	170,799	---	---	21,547	126,564	---	---	---	---	---	25,522	---	344,142
12. Car Repair and Inspection Forces	14,067	336,232	---	---	8,154	150,687	---	---	---	---	---	184,188	---	693,428
13. Miscellaneous	---	41,922 L	---	---	15,059 L	15,605	---	---	---	---	---	74,033	---	32,555
14. Total Other Expenses	$158,146	$1,750,402	$13,735	$ 14,589 L	$143,018	$745,274	---	---	$1,032	---	$12,867 L	$ 399,230	---	$ 3,181,581
15. Total Expenses Saved	$170,088	$1,795,025	$40,017	$ 67,658	$180,035	$804,212	$5,385	$5,678	$16,862	$15,828	$ 873	$1,415,197	$114,301	$ 4,631,159
D. Railway Tax Accruals														
1. Payroll Taxes	$ 20,027	$ 229,363	$ 3,884	$ 5,622	$ 19,758	$101,840	$ 704	$ 762	$ 2,130	$ 2,599	$ 122 L	$ 160,027	$ 17,683	$ 564,127
E. Total Savings, Revenues and Expenses	$190,115	$2,007,340	$43,901	$ 72,280	$191,503	$905,401	$6,089	$6,440	$19,992	$18,427	$ 4,001	$1,578,403	$135,184	$ 5,179,876
F. Interest at 5% on Net Cash Required For or Realized From Merger	$ 3,687	$ 203,784 L	$ 4,148	$ 19,904	$ 770 L	$ 3,174 L	$ 22 L	$ 91	$ 914	---	$ 37	$ 6,178	---	$ 172,791 L
G. Total Estimated Net Savings From Merger	$193,802	$1,803,556	$48,049	$ 93,184	$190,733	$902,227	$6,067	$6,531	$20,906	$18,427	$ 4,038	$1,584,581	$135,184	$ 5,007,085
H. Net Number of Positions Abolished	8	121	1	2	8	70	1	1	2	3	-	160	20	395
I. Switch Engine Tricks Eliminated - Per Week	13	97	-	5 I	18	60	-	-	-	-	-	22	-	205
J. Diesel Locomotives Released														
1. Yard	1	10	1	-	1	2	-	-	-	-	-	2	-	17
2. Road	-	-	-	-	-	6	-	-	-	-	-	-	-	6

No symbol - Gain
L - Loss
I - Increase

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PLAINTIFF'S EXHIBIT 2-B — STUDY II

ERIE - LACKAWANNA MERGER STUDY

Duplicate Lines

In a few localities the lines of the companies are parallel or close together. In other instances while the lines are not parallel, they serve the same points.

The purpose of Study II was to examine all these instances to determine whether any lines could be abandoned and still maintain good service to all important shipping and receiving points without loss in revenue or increase in expense. Attached Schedule A summarizes the instances where it is felt the merged company would be able to make such abandonments and shows the estimated salvage value, the cost of new construction necessary in connection with such abandonments, the non-recurring income tax savings which would result, the savings in operating expenses, the estimated improvement in net income which would result, the estimated number of diesel locomotive units which would be released, and other related information.

It will be noted that the miles of road which could be abandoned are estimated at 96.3. The salvage is estimated at $1,542,450, the cost of new construction is estimated at $2,056,1[illegible], and non-recurring income tax savings are estimated at $1,299,607. The abandonments would thus increase net cash by $723,391 and, at the same time, would effect an annual increase in net income before income taxes of $662,083.

The longest single line included in the study is the Erie line from Hillside Junction to Hawley, a distance of 41.1 miles. This line is used primarily for through service between the Wyoming Valley and northeastern New Jersey points which under merger would be maintained via the DL&W's present line, and no loss of revenue is anticipated from this abandonment.

The Erie line from Corning to Wayland, a distance of 36 miles, parallels the Lackawanna main line. With the exception of small segments to protect industries and interchange, this line would be retired with estimated annual savings of over $200,000. New connections with the Lackawanna would permit way freight and switching service to be performed by the merged company with only minor loss of freight revenue.

In addition to the savings shown, switching, transfer and mine run service savings made as a result of retiring duplicate lines numbers 2, 3 and 6 were included in Study I.

ERIE - LACKAWANNA MERGER STUDY

STUDY II
Schedule A

Duplicate Lines
Summary of Net Cash Realized and Estimated Savings

		1 Erie Hillside Jct.- Hawley	2 Erie Rock Jct.- Gypsy Grove	3 Erie Dunmore- East Jct.	4 Erie Binghamton- Great Bend	5 Erie Wayland- Corning	6 DL&W E. Buffalo- Black Rock	Total
A.	Miles of Road Abandoned	41.1	1.7	2.2	11.6	36.0	3.7	96.3
B.	Net Cash Realized From Merger							
	1. Salvage From Property Retired	$ 628,120 G	$52,496 G	$25,644 G	$ 410,980 G	$284,129 G	$141,081 G	$1,542,450 G
	2. Extraordinary Expenditures Next Four Years	---	---	---	---	---	---	---
	3. Cost of Property Acquired	---	---	40,815 L	1,542,413 L	146,060 L	328,880 L	2,058,168 L
	4. Cost of Relocating Property	---	---	---	9,270 L	7,630 L	43,598 L	60,498 L
	5. Non-Recurring Income Tax Saving	620,778 G	44,109 G	39,197 G	173,279 G	288,376 G	133,878 G	1,299,607 G
	6. Total Net Cash Realized	$1,248,898 G	$96,605 G	$24,016 G	$967,424 L	$418,815 G	$37,519 L	$723,391 G
	Estimated Net Savings							
C.	Revenue Lost							
	1. Freight Service	---	---	---	---	$ 487 L	$ ---	$ 487 L
	2. Passenger Service	---	---	---	---	---	---	---
	3. Miscellaneous	---	---	---	---	---	---	---
	4. Total Revenue Lost	---	---	---	---	$ 487 L	---	$ 487 L
D.	Expenses Saved							
	MW&S							
	1. Cost of Normalized Maintenance	$116,520	$10,195	$5,465	$97,290	$80,454	$28,702	$338,626
	2. Depreciation	28,367	3,584	2,472	8,684 L	25,635	4,851	54,225
	3. Total Maintenance of Way and Structures	$144,887	$13,779	$7,937	$88,606	$104,089	$33,553	$392,851
	Station Expenses							
	4. Combination	$ ---	---	---	$ 4,808	$ ---	---	$ 4,808
	5. Freight	9,423	---	---	---	26,904	---	36,327
	6. Total Station Expenses	$ 9,423	---	---	$ 4,808	$ 26,904	---	$ 41,135
	Other Operating Expenses							
	7. Freight Train Service	$ 94,335	$ ---	---	---	$ 39,605	---	$133,940
	8. Passenger Train Service	---	---	---	---	---	---	---
	9. Yard Transportation Forces	---	8,578	---	---	---	---	8,578
	10. Joint Facility - Expenses	---	---	---	---	---	---	---
	11. Total Other Expenses	$ 94,335	$ 8,578	---	---	$ 39,605	---	$142,518
	12. Total Expenses Saved	$248,645 G	$22,357 G	$7,937 G	$93,414 G	$170,598 G	$33,553 G	$576,504 G
E.	Railway Tax Accruals							
	1. Payroll Tax	$ 20,421 G	$ 2,351 G	$ 505 G	$ 9,727 G	$ 14,689 G	$ 2,203 G	$ 49,896 G
F.	Total	$269,066 G	$24,708 G	$8,442 G	$103,141 G	$184,800 G	$35,756 G	$625,915 G
G.	Interest at 5% on Net Cash Realized From Merger	62,445 G	4,830 G	1,201 G	48,371 L	20,941 G	4,876 L	361,170 G
H.	Total Net Savings	$331,511 G	$29,538 G	$9,643 G	$54,770 G	$205,741 G	$30,880 G	$662,083 G
I.	Road Diesel Locomotive Units Released	1	-	-	-	1	-	2

G - Gain
L - Loss

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PLAINTIFF'S EXHIBIT 2-C

STUDY XVI

ERIE - LACKAWANNA MERGER STUDY

Labor Contracts

A. Payments under the Washington Agreement or Interstate Commerce Act to employees deprived of employment or otherwise adversely affected by consolidation.

The effect of coordination or consolidation of railroad operations upon personnel has long been a subject of negotiation between management and labor organizations, and the question became particularly acute in the early 1930's when the depression was forcing such actions in order to effect necessary savings. A general agreement as to treatment of employees thus deprived of employment or otherwise adversely affected was reached in May, 1936, in Washington, D. C., between the labor organizations and the carriers, which has to a large extent set the pattern since that date and which has become known as the "Washington Agreement".

The question was further considered at length in connection with revisions of the Interstate Commerce Act in 1940 and Section 5 (2) which permits consolidation of carriers subject to approval of the Interstate Commerce Commission, also provides that the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. Certain allowances to affected employees were specified in the Act and these differ from the provisions of the Washington Agreement. Under some conditions the Interstate Commerce Act is more favorable to affected employees than the Washington Agreement, but under other conditions the Washington Agreement is more favorable.

The Commission applied the terms of the Interstate Commerce Act in its order dated May 17, 1944 in Oklahoma Ry. Co. Trustees Abandonment, 257 ICC 177, and for some years assumed that the allowance under the Interstate Commerce Act should be taken as the maximum allowance permissible. This position was assailed by the labor organizations and following the decision of the Supreme Court of the United States in Railway Labor Executives' Association v. the United States, 339 U.S. 142 dated March 27, 1950, it has been accepted that the Interstate Commerce Act represents minimum rather than maximum protection and that agreements between employers and employees can provide for greater protection.

In one of the most important recent cases, that of the consolidation of the Louisville and Nashville and the Nashville, Chattanooga and St. Louis, F.D. No. 18845, decided March 1, 1957, the Commission proposed conditions giving the protection afforded by the Washington Agreement, reduced as to dismissed employees to the extent that they receive compensation in any other employment or under employment insurance laws, with minimum protection being that afforded by the so-called "Oklahoma conditions" based on the Interstate Commerce Act.

STUDY XVI
[fol. 136]

In the present instance, the merger of the two companies under study would result not only in reductions in working forces, but also in dislocations and rearrangements affecting many of the remaining employees and the first purpose of Study XVI was to estimate the payments that would be required by the Interstate Commerce Commission for the protection of employees deprived of employment or otherwise adversely affected by the merger.

The Washington Agreement provides for four types of payments to employees affected by consolidation which are summarized in the following paragraphs:

(a) "Displacement Allowance" (Section 6) - Employees who, while not losing their jobs, are placed in a worse position with regard to compensation and rules governing working conditions at any time during a period not exceeding five years from the effective date of a consolidation, are entitled to receive a "displacement allowance". This allowance is a monthly payment equal to the difference between the average monthly compensation for the year preceding displacement and the compensation received after displacement.

(b) "Coordination (Consolidation) Allowance" (Section 7) - Any employee who within three years from the effective date of the consolidation, is deprived of employment as a result of consolidation or coordination, shall for certain specified periods received a monthly allowance equal to 60% of his average monthly compensation for the year preceding his release, except that a lump sum payment is made for employees with less than one year's service. The allowances are made in accordance with the table below:

[fol. 137]

Length of Service of Employee

	Lump Sum Payment
Less than one year	Equivalent to 60 days pay

	Payments equal to 60% of average monthly compensation for period of -
One year and less than two years	6 months
Two years and less than three years	12 months
Three years and less than five years	18 months
Five years and less than ten years	36 months
Ten years and less than fifteen years	48 months
Fifteen years and over	60 months

This allowance shall be reduced to the extent of an employee's earnings in other railroad employment.

(c) "Separation Allowance" (Section 9) - Any employee eligible to receive a "coordination (consolidation) allowance" may, in lieu thereof, take a lump sum payment called a "separation allowance" as set forth below:

	Separation Allowance
Less than one year	5 days pay for each month worked.
One year and less than two years	3 months pay.
Two years and less than three years	6 months pay.
Three years and less than five years	9 months pay.
Five years and over	12 months pay.

(d) "Moving Allowance" (Sections 10 and 11) - The agreement also provides that any employee who accepts a change in the location of his employment as a result of consolidation shall be reimbursed for his moving and traveling expenses, and for loss of wages not to exceed two days, provided the expenses are incurred within three years of the date of the consolidation (Section 10). It further provides that employees who move shall also be reimbursed for any loss in their equity in a home, or for cost of cancellation of a lease (Section 11).

STUDY XVI

[fol. 138]

Section 5 (2) of the Interstate Commerce Act as amended in 1940 includes the following:

> (f) As a condition of its approval, under this paragraph (2) of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the (Interstate Commerce) Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

For the purpose of this study the Interstate Commerce Act provisions were applied except where the Washington conditions as modified in the Louisville and Nashville case afforded more protection. The total cost is estimated at $3,108,187, and the calculations underlying this figure, together with the methods used and the assumptions requisite to develop these costs, are shown in Schedule A.

Payments to employees would be chargeable to operating expenses and thus become a deduction in computing Federal income taxes. At the current rate of 52%, the reduction in income taxes would be $1,616,257, and the remaining cost of $1,491,930, would be borne by the merged company. Interest at 5% on this amount, or $74,597, is included in the study as an annual charge against the merger.

Merger plans have, of course, not yet progressed to the point where the effect upon specific personnel can be clarified to indicate which of those employees deprived of employment at their present location, and who are offered transfer to a different location, would be willing to make the transfer with proper compensation for moving costs, and what proportion would prefer to remain where they are and take the consolidation or separation allowance. On the basis of present limited knowledge, the range between a reasonable minimum and a reasonable maximum estimate of possible payments is wide. Our estimates have knowingly been made on

premises which would tend to produce maximum estimated costs rather than minimum, and it is quite possible that the ultimate cost will be materially less than that herein estimated.

B. Other effects of merger upon labor contracts and estimated costs of equalizing rules and rates of pay.

The payments estimated above would be handled under basic rules which have been tested and clarified over a long period of years, although still subject to modification. A second and even more difficult area of labor problems involves the consolidation of operations into a unified whole, the merging of seniority rosters into single lists of employees who would perform the consolidated operations at various points, the reconciliation of variations in rates of pay and working rules, the concentration of through traffic on the shortest or most economical joint routes resulting in transferring freight from one through line to another, etc. Agreement on these problems will be difficult on any basis, particularly so if the problems at each local point are to be settled individually. There will be interminable delays in effecting merger unless general principles on a system-wide basis can be negotiated for use in settling specific problems. As pointed out in the report proper, we believe that as soon as plans have been sufficiently crystalized, steps should be taken to advise the labor organizations of the progress made and to seek a preliminary understanding as to the basic principles to be adopted where labor is concerned.

The only factors above to which it appears possible to assign definite dollar value are the matters of rates of pay and working rules. These have been analyzed craft by craft, and it has been assumed that where system-wide differences exist the basis most favorable to the employees would become the standard of the merged company, but that existing local or point variations would be unchanged.

The estimated annual cost of equalizing the differences in rules and rates of pay is $510,000, and when payroll taxes are added to the portion represented by wages the total estimated annual increase in costs is $571,454.

Estimated Payments to Employees Deprived of Employment
or Otherwise Adversely Affected by Merger

	Note No.	Years After Merger 1st	2nd	3rd	4th	5th	Total
Number of Employees Affected							
1. Employment at Beginning of Year		28,103	27,689	26,854	26,353	26,157	
2. Employment at End of Year		27,689	26,854	26,533	26,157	26,069	
3. Jobs Abolished	(1)	403	818	484	190	87	1,982
4. Jobs Created by Attrition	(2)	2,507	2,440	2,402	2,387	2,380	12,126
5. Displaced Employees Re-employed Locally	(3)	189	384	227	89	41	930
6. Jobs Transferred	(4)	430	958	481	191	99	2,159
7. Transfers Accepted	(4)	258	575	289	115	59	1,296
8. Transfers Refused	(4)	172	383	192	76	40	863
9. Employees Deprived of Employment	(5)	172	383	192	76	40	863
10. Jobs Created by Attrition, Not Used	(6)	2,318	2,056	2,175	2,298	2,339	11,186
11. 20% of Line 10		464	411	435	460	468	2,238
12. Employees Taking Separation Allowance	(7)	77	172	86	34	18	387
13. Employees Entitled to Consolidation Allowance	(7)	95	211	106	42	22	476
1st Year Employees		95	--				
2nd " "			211	--			
3rd " "				106	--		
Estimated Cost of Allowances							
A. Employees Deprived of Employment							
14. "Separation Allowance"	(7)						
Number		77	172	86	34	18	
Estimated Allowance		$ 295,295	$ 659,620	$ 329,810	$130,390	$69,030	$1,484,145
15. "Consolidation Allowance"	(8)						
Number		95	211	106			
Estimated Allowance							
1st Year Employees		$ 79,895					
2nd " "			$ 177,451				
3rd " "				$ 89,146			
Total		$ 79,895	$ 177,451	$ 89,146			$ 346,492
B. Employees Accepting Transfer							
16. "Moving Allowance"	(9)						
Number		258	575	289	115	59	
Estimated Allowance							
Moving Cost		$ 109,650	$ 244,375	$ 122,825	$ 48,875	$25,075	
Loss on Home		129,000	287,500	144,500	57,500	29,500	
Total		$ 238,650	$ 531,875	$ 267,325	$106,375	$54,575	$1,198,800
C. Employees in Worse Position							
17. "Displacement Allowance"	(10)						
Number		47	96	57	22	10	
Estimated Allowance							
1st Year Employees		$ 11,750					
2nd " "			$ 24,000	$ 12,000			
3rd " "				14,250	$ 8,750		
4th " "					5,500		
5th " "						$ 2,500	
Total		$ 11,750	$ 24,000	$ 26,250	$ 14,250	$ 8,500	$ 78,750
D. Total Estimated Payments		$ 625,590	$1,393,946	$ 713,531	$251,015	$126,105	$3,108,187

|fol. 141|

STUDY XVI
Schedule A

Explanation of Methods Used and Assumptions Made in Schedule A

Note No.

(1) The number of jobs which would be abolished in the various studies was determined by actual count where possible. Where the number of employees was not shown, an estimate was made by dividing estimated wages saved by the average compensation for the type of employees involved. Jobs abolished, thus determined, were separated by I.C.C. wage reporting division groups by studies, and in the case of Groups I, II, and IV, Studies VIII, IX and XIV were further separated between principal locations. Jobs which would be created at various locations as a result of changes in the operations of the merged company were also shown. Officials and off-line and on-line agencies of the Traffic Department were analyzed separately.

(2) An analysis of the employment records of both companies was made for the years 1954, 1955 and 1956 to determine the number of employees who left the service because of deaths, retirements, dismissals and resignations by I.C.C. reporting division groups. This number was related to total employees in each group to determine the per cent of attrition. Not all jobs created by attrition, however, were considered to be available to absorb employees whose jobs were abolished, since most resignations are on junior jobs and there are frequently several resignations on the same job in the same year. The following table shows the per cent of jobs created by attrition considered available.

I.C.C. Group No.	D E S C R I P T I O N	Per Cent
I	Executives, officials and staff assistants	100
II	Professional, clerical and general	80
III	Maintenance of way and structures	50
IV	Maintenance of equipment and stores	40
V	Transportation (other than train, engine and yard)	60
VI-a	Transportation (yardmasters, switch tenders and hostlers)	50
VI-b	Transportation (train and engine service)	50

(3) Displaced employees at locations where the railroads have substantial forces were considered re-employed locally in jobs made available by attrition at those locations. It was assumed displaced employees at other locations would be offered transfers to locations where jobs created by attrition were available.

STUDY XVI
Schedule A

Note No.

(4) Jobs requiring transfer were determined by actual analysis in each Group and it was assumed that only 60% of the employees would accept such jobs, with the remainder refusing transfer and accepting the allowances provided by law. Transfers were assumed to be made only within I.C.C. employee groups and in the case of Groups I, II and IV were limited by the total of new jobs created at specific locations.

(5) Men deprived of employment are those employees who refuse transfer.

(6) Jobs made available by attrition in any given year that were not used to provide jobs for employees whose jobs were abolished in that year were used to offer re-employment to employees whose jobs had been abolished in prior years. Within each I.C.C. Group, it was assumed that 20% of the excess jobs created by attrition in each year after the first would be at a location where they could be offered to former employees receiving allowances. Whether such employees accepted or not, they would then cease to receive allowances. Twenty per cent of the balance of jobs available by attrition were used to reduce the number of employees who would receive a displacement allowance, as described in Note (10).

(7) It was assumed that 75% of the employees deprived of employment in the Cleveland and New York-New Jersey areas and 25% of the employees in other areas would accept separation allowances, and that the remainder would become entitled to consolidation allowances. The number of employees taking separation allowances was determined by applying weighted average per cents reflecting the above assumption within each I.C.C. Group. It was assumed the lump sum payment for employees would be based on an average of three years service, which would produce nine months' pay or $3,819, based on average compensation for 1956.

(8) Under the Washington Agreement the allowance was taken at 60% of the average compensation of $5,113 for all employees for the year 1956, or $3,068, reduced in the first year only by $1,000 representing unemployment compensation received. It was assumed that employees losing their jobs would earn 80% of their railroad earnings from other employment in the Cleveland and New York-New Jersey areas and only 20% elsewhere, a weighted average of 64.0%. Accordingly, a deduction of $3,272 was made for outside earnings. Only employees deprived of employment in the

[fol. 143]

Note No.

first three years were protected and the period of payment was limited to 18 months, reflecting the assumed average length of service of three years.

Under the Interstate Commerce Act, the allowance was based on average compensation for all employees for 1956 of $5,113, reduced in the first year only by $1,000 representing unemployment compensation received. As described above, a deduction of $3,272 was made for outside earnings. Since employees were assumed to have had an average length of service of three years, only employees deprived of employment during the first three years were given protection and all payments were terminated at the end of the third year.

(9) Moving costs for each employee transferred were estimated at $375 to which was added $50 representing two days' pay, making a total of $425.

It was estimated that 259 homes would have to be sold at an average loss of $2,500.

The losses described above are protected for a maximum of three years under the Washington Agreement and a maximum of four years under the Interstate Commerce Act. It was assumed, however, that the merged company would give this protection for the full period during which transfers would take place.

(10) It was assumed that 25% of the estimated number of employees placed locally, based on the location studies described in Note (1), would be offered jobs paying less than they previously earned and that the average loss would be $1.00 a day or $2[illegible] a year. The allowance was not continued beyond the fifth year, as it was assumed that employees would have regained their original rates by that time. It was also assumed that in each year after the first the number of persons entitled to a displacement allowance would be reduced by 20% of the balance of jobs made available by attrition but not otherwise used.

[fol. 144]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

PLAINTIFF'S EXHIBIT 3

AGREEMENT

between

THE DELAWARE, LACKAWANNA AND WESTERN R. R. CO.

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

EFFECTIVE JULY 14, 1941

[fol. 145]

SCOPE

The rules contained herein shall govern the hours of service, working conditions and rates of pay of the following employes in the Maintenance of Way and Structures Department:

BRIDGE AND BUILDING

Leading Mechanics, Mechanics (carpenters, iron workers, repairmen, masons, scalemen, dock builders, and painters) and their Helpers, Bridge Inspectors, Drawbridge Tenders, Drawbridge Deckmen, Floating Equipment Operators, Floating Equipment Watchmen, Pumpmen, Cooks, Assistant Cooks, Watchmen and Laborers employed in the Bridge and Building Sub-department of the Maintenance of Way and Structures Department;

TRACK

Track, Gardener, Patrol, and Repairmen Foremen and their Assistant Foremen, Rock Inspectors, Material Inspectors, Rockmen, Repairmen, Curve Liners, Assistant Repairmen, Crane Operators, Assistant Crane Operators, Truck Driver, Insulated Joint Repairmen, Crossing and

other Watchmen, Repairmen Helpers, Cooks, Assistant Cooks, Trackmen and Laborers employed in the Track Sub-department of the Maintenance of Way and Structures Department;

TREATING PLANT

Foremen, Assistant Foremen, Carpenters, Carpenter Helpers, Watchmen and Laborers employed in the Treating Plant Sub-department of the Maintenance of Way and Structures Department and assigned to work at the Federal Creosoting Plant at Paterson, New Jersey.

[fol. 146]

RULE 1

SENIORITY

Except as provided in Rule 10 (h) seniority will begin at the time the employe's pay starts in the class in the sub-department in which employed.

RULE 2

SENIORITY RIGHTS

Seniority rights accruing to employes under this agreement entitle them to consideration for positions in accordance with their relative length of service in the Maintenance of Way Department as hereinafter provided.

RULE 3

RETENTION IN FORCE REDUCTION

(a) When forces are reduced, the senior employes in the class of the sub-department on the seniority district shall be retained.

(b) Employes promoted to positions in their own sub-department in accordance with Rule 13 will continue to accumulate seniority in classes from which promoted and when force is reduced will be allowed to exercise their seniority in their former classes.

(c) Track Foremen, Assistant Track Foremen, Repairmen Foremen, Repairmen and Assistants laid off on account of force reduction will be permitted to displace junior employees in lower classes on their own seniority district in track sub-department.

(d) Thirty-six (36) hours' notice will be given before hours or forces are reduced.

[fol. 147]

DISPLACEMENT

(e) An employe will not be considered as being displaced until the individual asserting displacement rights actually starts work in this position, and notification of displacement must be given to the foreman or supervisory officer during the working hours of the day previous to starting work.

PREFERENCE

(f) Employes laid off because of force reduction will, when opportunity arises and if qualified, be given preference to employment in other classes or on other seniority districts in preference to hiring new employes, but will not establish seniority standing on other than his original roster.

REDUCTION IN FORCE

(g) Except as otherwise provided, the assignment for hourly rated employes will not be reduced below five (5) eight (8) hour days each week to avoid making force reduction, unless agreed to by Management and General Chairman.

RULE 4

SENIORITY LIMITS

(a) Seniority rights of all employes are confined to the sub-department in which employed and are restricted to the following seniority districts:

Bridge & Building Sub-Department:

District 1, New York Harbor and New Jersey except the Delaware River bridges.

District 2, Pennsylvania except between M. P. 220 and M. P. 237 but including the Delaware River Bridges.

District 3, New York State and between M. P. 220 and M. P. 237 in Pennsylvania.

[fol. 148] Track Sub-Department:

District 1, to include all territory between M. P. O to M. P. 47 on Cut-Off. Also to M. P. 48 on Washington Line and including Main Line, Morristown Line, Montclair Branch, P. & D. Branch and Sussex Branch also the vicinity of New York Harbor.

District 2, from M. P. 47 on Cut Off to M. P. 103. From M. P. 48 to Slateford Junction on Washington Line including Bangor and Portland Branch, Phillipsburg Branch and Hampton Branch.

District 3, from M. P. 103 to M. P. 192 including Scranton and Binghamton Yards, Montrose Branch, Old Line, and Diamond and Winton Branches.

District 4, from M. P. 192 to M. P. 294 including Ithaca Branch.

District 5, from M. P. 294 to M. P. 396 including Black Rock Branch.

District 6, from M. P. 134 to M. P. 213 on Bloomsburg Branch including Keyser Valley Branch and Hanover-Newport Branch.

District 7, from M. P. 193.37 to M. P. 306.2 at Oswego including Cincinnatus Branch.

District 8, from M. P. 202.38 to M. P. 286 at Utica including Richfield Springs Branch.

Paterson Treating Plant Sub-Department:

One seniority district.

SYSTEM

(b) System seniority shall prevail in the following classes:

[fol. 149]

Track Sub-Department

Repairmen Foremen	Material Inspectors
Repairmen	Crane Operators
Assistant Repairmen	Assistant Crane Operators
Repairmen Helper	Curve Liners
Rock Inspectors	Cooks and Assistants
Rockmen	

RULE 5

REASSIGNMENT OR CHANGE IN FORCE

When forces are increased, when vacancies occur, when new positions are created or when displacements are to be made, employes affected, before returning to work or changing position, will present to their foreman or supervisory officer a letter from the General Chairman containing rights he may have under this agreement and if not properly assigned in accordance with such rights will be compensated for wage loss. Except for emergencies, notification of such change or increase in force will be promptly furnished the General Chairman by the Management.

Employes notified by the General Chairman to report back to work and failing to do so after ten (10) days will forfeit all seniority rights.

When forces are reduced employes affected will have the right within ten (10) days after being notified and in accordance with the foregoing procedure to displace employes having less seniority.

RULE 6

EXPENSES

Employes accepting positions in the exercise of their seniority rights will do so without causing extra expense to the railroad except as provided in these rules.

[fol. 150]

RULE 7

Voluntary Demotion

An employe who of his own choice desires to be demoted to a lower class will be permitted to do so in which case he shall forfeit all seniority in the higher class from which demoted. This rule does not apply to instances of temporary employment on account of sickness or for other good cause if authorized by agreement between the General Chairman and the Management.

RULE 8

In Temporary Service

An employee agreeing to accept temporary assignment by direction of the Management will retain his seniority rights and shall return to the former position at the expiration of the temporary assignment unless his position is abolished or is filled by an employe of greater seniority under displacement rules in which case he shall exercise his seniority rights in securing a position in his own seniority district. Temporary transfers under this rule will not exceed a period of ten (10) days.

RULE 9

Change of District

(a) There will be no change in Seniority District unless agreed to by Management and General Chairman in which case seniority rights of employes affected will be adjusted in the revised districts.

Special Case

(b) When large gangs are assembled for rail laying, employes having seniority rights on the district where the work is being done will be afforded opportunities to perform this work. When such procedure is not practicable [fol. 151] and economical, employes from other districts

or new men will perform this work as agreed upon between the Railroad Company and the General Chairman.

[fol. 152]

RULE 11

Roster

(a) Seniority rosters of employes of each class in each sub-department by Seniority Districts will be separately compiled. Copies will be furnished each foreman with instructions to post same in tool houses, shops, marine equipment or outfit cars. Watchmen's roster will be posted in watch shanties. All rosters will be available for inspection by employes interested. Copies will also be furnished to employes' representatives.

Scope of Roster

(b) Seniority Roster will show the name, classes and last date of entry of the employe into the sub-department of the Maintenance of Way Department and date of promotions except that the names of trackmen or laborers will not be included until they have worked a total of three (3) [fol. 153] months or more within a period of two (2) years. During this accumulative period trackmen or laborers will, however, be permitted to exercise such seniority as they may have acquired.

Roster Revision

(c) Rosters will be revised in January and posted in March of each year and will be open to correction for sixty (60) days from date posted. Except to correct typographical errors, this sixty (60) day provision may be invoked only in the case of employes whose names appear on the roster for the first time.

Note—The first roster under this agreement will be posted as soon as possible, but not later than sixty (60) days from the effective date of this

agreement and will be open for correction for a period of six (6) months after posting.

[fol. 154]

RULE 13

Posting Bulletin

(a) When new positions are created or when vacancies occur, a bulletin will be posted promptly and in no event later than ten (10) days after the new positions have been created or the vacancies occur. Such bulletin shall show the location, descriptive title, hours of service, and rate of pay. The bulletin to be posted for a period of ten (10) days in an available location at the headquarters of the employes in the sub-department entitled to consideration in securing the positions during which time the employes may file their applications with the official whose name appears on the Bulletin with a copy to General Chairman. Temporary vacancies of ten (10) days or less duration need not be bulletined.

Assigned to Positions

(b) The senior qualified applicant will be assigned to the position promptly and not later than thirty (30) days from the date the vacancy first occurred or new position was created.

Making Known Assignment

(c) A copy of the bulletin and notice of assignment shall be furnished to the General Chairman of the Employes' Organization and the name of the employe assigned to the position shall be posted on bulletin boards within the seniority district.

Filling Jobs Awarded

(d) When jobs are awarded they shall be filed within seven (7) days. In the event of the failure of the first qualified applicant to fill the same within seven (7) days,

the position shall then be awarded to the next senior qualified applicant.

. . . . . .

[fol. 155]

In United States District Court
For the Eastern District of Michigan

Plaintiff's Exhibit 4

AGREEMENT

BETWEEN

Erie Railroad Company

AND

The Trustee of the Property of
The New Jersey and New York
Railroad Company

AND

The Crossing Watchmen, Drawbridge Engineers, and Drawbridge Tenders Employed Thereon

Represented by the

Brotherhood of Maintenance of Way
Employes

Governing Hours of Service,
Working Conditions and Rates of Pay

Effective July 1, 1951

. . . . . .

[fol. 156]

Rule 3

Seniority

(a) Except as otherwise herein provided, persons entering the service of the Erie Railroad as crossing watchmen, drawbridge engineers, or drawbridge tenders, providing their applications (written or oral) are approved, will accumulate seniority from the time their pay starts in the

[fol. 157] class in which employed. Applications not disapproved within ninety (90) days will be considered accepted. In the event that applicant gives false or inadequate information as to previous employment, this rule shall not apply.

(b) Seniority rights of all employes covered by this agreement are confined to the jurisdiction of one division engineer, except that on the New York Division and New York Terminal Division, there will be one roster and this shall be considered one seniority district.

(c) It is agreed that effective with the date of this agreement drawbridge engineers will establish seniority as crossing watchmen, and it is understood that they will exercise seniority if and when forces are reduced as drawbridge engineers in accordance with the seniority they now hold as crossing watchmen.

It is further agreed that employes working as drawbridge tenders will hold and accumulate seniority rights as crossing watchmen and will be selected from the ranks of crossing watchmen.

Rule 4

Rosters

(a) A separate seniority roster will be compiled for crossing watchmen (including drawbridge tenders) and drawbridge engineers.

The seniority roster will show the name and date the employe accepted a bulletined position.

(b) Rosters will be revised and corrected during June of each year. No additions will be made to the rosters except to add names and seniority dates of new employes who acquired seniority subsequent to the posting of the previous roster or to eliminate names of those who have left the service. Protests (except for typographical errors) [fol. 158] will be confined to names and dates added since posting of previous annual roster, and such protests must be made within sixty (60) days from first posting. On proof of error, correction will be made. Where no protests

(except for typographical errors) are received within sixty (60) days from first posting, seniority dates will be considered correct and not subject to protest on any subsequent rosters unless otherwise changed by mutual agreement between the division engineer and the general chairman, or their representatives.

(c) In the event of change of seniority districts, as defined in Rule 3(b), employes transferred will maintain their original seniority date in the new seniority district. In the event two or more seniority districts are consolidated, the rosters will be combined.

Rule 5

Force Reduction

(a) When force is reduced or positions abolished, the employe affected will have the right to displace a junior employe providing he possesses the necessary qualifications.

(b) When forces are reduced, employes affected will have the right within ten (10) days after being notified of such reduction, to exercise seniority in accordance with these rules.

(c) Two (2) working days notice will be given regularly assigned employes before reduction is made and list of men laid off will be furnished by the proper officer to the local chairman. The day on which employes are notified during regular working hours will count as first day. This paragraph does not apply to men called for work in emergencies, or extra men.

(d) An employe laid off by reason of force reduction will retain his seniority rights provided that within ten (10) [fol. 159] days after being notified, he files in writing, with his supervisor, his name and address. Employes who fail to do this, or to keep the supervisor informed as to where they can be found, or who fail to return to the service within ten (10) days after being so notified by registered mail at their last known address, will forfeit all seniority rights. In case disputes arise, the records to show that the employe

has complied with this rule, will be made available to the employe's representative upon request.

(e) Employes laid off account of reduction in force will be advised on their inquiry, when the information is available, where employes junior in the service in the same class or lower classes, are located, in order to assist them in exercising their seniority rights.

Rule 6

Temporary Assignment

An employe accepting any temporary assignment on request of the Management will retain his seniority rights and may return to his former position at the expiration of the temporary assignment or he may exercise seniority to any position bulletined in his absence. If during the time an employe is filling a temporary position, his former position is abolished or is filled permanently by a senior employe in the exercise of seniority, he may exercise seniority in accordance with Rule 5(a). Temporary transfers under this rule will not exceed a period of ninety (90) days unless otherwise agreed upon between the Chief Engineer M. of W. and the General Chairman, or their designated representatives.

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[fol. 160]

Rule 8

Bulletins

(a) When new positions are created or when vacancies occur bulletin will be posted promptly and in no event later [fol. 161] than five (5) days after the new positions have been created or the vacancies occur. Copy of such bulletin shall be furnished to Local Chairman. Such bulletins shall show the location, hours of service, and rate of pay. The bulletin to be posted for a period of ten (10) days at locations available to the employes, during which time the employes may file their applications with the official whose name appears on the bulletin.

(b) Temporary vacancies that are known to exceed thirty (30) days will be advertised in accordance with the above paragraph. Temporary vacancies of less than thirty (30) days, and of undetermined periods, need not be bulletined and will be filled by the Management from qualified available extra crossing watchmen.

(c) The senior qualified applicant will be assigned to the position promptly and not later than twenty (20) days from the date the bulletin was posted.

(d) When no applications for positions advertised under these rules are received from employes who are entitled to consideration, the positions may then be filled by the Management with qualified employes or furloughed employes from the Maintenance of Way Department or other departments when available. If not available, new men may be employed.

(e) Copy of the bulletin and notice of assignment shall be furnished to the Local Chairman and the name of the employe assigned to the position shall be posted on bulletin boards within the seniority district.

(f) When an employe bids for and is awarded a permanent position his former position will then be declared vacant and bulletined. Such an employe is not entitled to apply for the position which has just been vacated by him, [fol. 162] however, if the former position becomes vacant and is again bulletined his application will then be given full consideration.

(g) Employes awarded an advertised position will be given a fair chance to demonstrate their ability to meet the requirements of the position and, failing to qualify within thirty (30) calendar days, may return to their former position in accordance with the seniority provisions of this agreement.

[fol. 163]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

PLAINTIFF'S EXHIBIT 5

AGREEMENT

BETWEEN

ERIE RAILROAD COMPANY

AND

DEPARTMENT OF STRUCTURES' EMPLOYES

Represented by

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

Effective February 1, 1946

[fol. 164]

ARTICLE 1—SENIORITY

Seniority

RULE 1. Seniority in the Department of Structures will begin at the time an employe's pay starts in the occupation in which first employed, provided his application for employment has been approved. He will hold and accumulate seniority in his own occupation and all lower occupations on his seniority roster.

Seniority in higher occupations on the seniority roster will be established as of the date an employe is assigned by bulletin as the regular occupant.

Rosters

RULE 2. (a) Seniority rosters for Groups 1 and 2 will be prepared. Copies will be posted at each headquarters for

inspection by all employes and their representatives will be furnished with a copy thereof.

[fol. 165] (b) Rosters will show the name and date first employed and subsequent dates advanced in each higher occupation.

(c) The first roster will be posted for a period of ninety (90) days and will be subject to protest. Any protest must be in writing giving full particulars. If no protest is made of first seniority roster dates within the ninety (90) day period, then roster dates will be considered as correct and not thereafter subject to change.

(d) Rosters will be revised and corrected during June of each year. No additions will be made to the rosters except to add names and seniority dates of new employes who acquired seniority subsequent to the posting of the previous roster or to eliminate names of those who have left the service. Protests (except for typographical errors) will be confined to names and dates added since posting of previous annual roster, and such protests must be made within sixty (60) days from first posting. On proof of error, correction will be made. Where no protests (except for typographical errors) are received within sixty (60) days from first posting, seniority dates will be considered correct and not subject to protest on any subsequent rosters.

(e) Seniority rights of employes on the rosters will extend over the entire system.

* * * * * * *

[fol. 166] *Reduction in Forces*

Rule 4. (a) When it is necessary, account reduction of expenses, to reduce forces, employes affected will have the right to displace junior employes within ten (10) days or forfeit the right of displacement.

(b) An employe laid off account of reduction in force must file in writing, within ten (10) days, with the Foreman and the Supervisor of Bridges his name and address, if he desires to retain his seniority rights. Employes who

fail to keep the Foreman and the Supervisor of Bridges advised as to where they can be reached, or who fail to return to service within ten (10) days after being notified by U. S. Mail, will lose their seniority rights.

(c) When forces are reduced or positions abolished, employes will be given not less than four (4) calendar days advance notice.

ARTICLE 2—ASSIGNMENTS

Assignments

RULE 5. (a) New positions or vacancies will be promptly bulletined on standard form, as per sample incorporated in this agreement, at the fabricating yard and headquarters of each gang for ten (10) days, except that temporary vacancies because of sickness or disability of employes will not be subject to bulletin or bid until the expiration of sixty (60) days.

(b) Assignments to new positions, or to fill vacancies will be made after bulletin notice has been posted for a period of ten (10) days at the fabricating yard and headquarters of each gang, during which time employes may file their applications with the officer whose name appears on the bulletin. The selection will be made and announced before the expiration of twenty (20) days from date bulletin is posted.

The successful applicant will fill the position within ten (10) days and his position will be promptly bulletined.

New positions or vacancies may be filled temporarily pending assignment.

New positions or vacancies for which there are no qualified applicants after expiration of bulletin period shall be filled by the Management.

(c) Assignments to positions within the scope of these rules and rates of pay shall be based on ability, merit and seniority; ability and merit being sufficient, seniority shall govern.

(d) An employe assigned to a higher rated position within the scope of these rules and rates of pay and fail-

ing to qualify within thirty (30) days may return to his former position or exercise seniority rights on any position that has been advertised in the meantime but will not acquire any seniority in the higher rated position for which he failed to qualify.

[fol. 167] (e) Employes declining promotion or who do not bid for advertised positions shall not lose their seniority.

(f) An employe may be temporarily transferred from one gang to another when necessary to build up a gang to meet the requirements of the service in this department. Such transfer will not extend over ninety (90) days unless extended by agreement between duly authorized representative and the Management. In making such transfers the senior qualified man in the gang from which transfer is made will be given first option. Thereafter other qualified men will be given their option in turn. The junior qualified man must accept the transfer. At the end of the transfer period, such employe will return to his gang or, if his position no longer exists with that gang, exercise his seniority rights.

(g) Employes transferred by direction of the management during the regular work week will be compensated at straight time rates for all time consumed in route waiting or riding. It will be understood that when transfers are made over a week-end they will be at no expense to the Railroad.

(h) Copies of bulletins and assignments will be furnished the General Chairman.

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[fol. 168]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

PLAINTIFF'S EXHIBIT 6

AGREEMENT

BETWEEN

ERIE RAILROAD COMPANY

AND

Trustee of the Property of

THE NEW JERSEY AND NEW YORK
RAILROAD COMPANY

AND THE

Employees thereon represented by the

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES

Governing Hours of Service
and Rates of Pay

EFFECTIVE: JANUARY 1, 1952

[fol. 169] *Seniority*

Rule 2

No seniority will be established by a new employe until his employment application is approved. Applications not disapproved within ninety (90) days will be considered accepted, except where a man makes falsification on his employment papers. When a new employe is hired in a group he will establish seniority in the class in which employed and all lower classes in that group. Employes who have established seniority in a group may make application for positions of higher rank or base pay advertised in

other groups and if they are the successful applicants they will establish seniority in the new group in the class to which transferred and all lower classes in that group as of [fol. 170] the date they are assigned to that group. They will also retain and continue to accumulate seniority in their original group. Such an employe who leaves the new group by application for position in another group or in his original group will then forfeit seniority in the new group. If such an employe is displaced he may return to his original group but will continue to retain and accumulate seniority in the new group.

No employe may hold seniority in more than two groups at any one time.

Except as hereinabove provided in Paragraph one of this rule, employes will establish seniority rights on rosters as of the day their pay starts.

When two or more employes are promoted in accordance with these rules on the same day the senior employe will be entitled to the senior rank.

When two or more employes are hired on the same day the Management will establish their rank on the roster.

Limits

Rule 3

Except as otherwise provided in Rule 2, seniority rights of employes will be confined to the jurisdictions of the following supervisory officers:

Division Engineer—Groups 1, 2, 3, 4 and 5.

Supervisor of Work Equipment and Welding—Groups 6 and 7.

Engineer M. of W.—Group 8.

NOTE: For group 8 Engineer M. of W. will put out the advertisement, bids will be sent to Supervisor of Work Equipment and Welding who will make the assignments.

[fol. 171] *Change in Seniority Districts*

Rule 4

When change is made in the limits of any seniority districts or divisions, seniority rights of employes affected can only be adjusted on the revised district or division by agreement between the management and the General Chairman or their accredited representatives.

Force Reduction

Rule 5

(a) When force is reduced, employes affected shall have the right, within ten calendar days after being notified of such reduction, to exercise seniority to displace junior employes on their own seniority district, or they forfeit displacement rights. Employes failing to exercise displacement rights will be considered as laid off and subject to paragraph (d) of this rule.

(b) Two (2) working days notice will be given employes before reduction is made and list of regular assigned roster men laid off will be furnished by the proper officer to the local chairman. The day on which employes are notified during regular working hours will count as first day. This paragraph does not apply to men called for work in an emergency.

(c) When forces are increased or when vacancies occur, employes laid off will be recalled to service in accordance with their seniority subject to paragraph (d) of this rule.

NOTE: Employes will not be required to return for work at points unreasonable distances from the regular headquarters. An employe waiving rights in such instances must do so in writing to the officer whose name appeared on the notice.

[fol. 172] (d) Employes laid off who desire to retain their seniority rights to be recalled to service must file in writing within ten (10) days with their foreman and immediate supervising officer (copy to the local chairman) their names

and addresses, also renew same upon each change of address. Failure to advise their foreman and immediate supervising officer and local chairman of a change in address or to return to the service within ten (10) days after being notified to return by United States mail at their last known address, will result in forfeiture of all seniority rights, except when otherwise agreed upon between Division Engineer and Local Chairman.

Making Promotions

Rule 6

Promotions shall be based on fitness, ability and seniority. Fitness and ability being sufficient, seniority shall govern.

. . . . . .

[fol. 173] *Temporary Service*

Rule 10

(a) An employe agreeing to accept a temporary assignment by direction of the Management will retain his seniority rights and may return to his former position either prior to or at the expiration of the temporary assignment or may exercise seniority to any position bulletined in his absence. If during the time an employe is filling a temporary assignment his former position is abolished or is filled permanently by a senior employe in the exercise of seniority, he may exercise seniority in accordance with Rule 5(a). Such employes will not establish any seniority on other than their own home seniority district. Any such employes who decline such temporary assignments or transfers may exercise their home seniority district rights.

[fol. 174] *Seasonal Service*

(b) When an employe bids for and is awarded a seasonal position as Assistant Extra Gang Foreman and such sea-

sonal assignment terminates, he will have the right to displace a junior employe of the same class on his own seniority district; otherwise he may return to his former position and location. If his former position does not exist he then may exercise seniority in accordance with Rule 5(a).

Rosters

Rule 11

A separate seniority roster will be compiled for each group of employes on each seniority district. Rosters will show group, class, name, date of entry of the employe into the M. of W. Department and dates of promotion to higher classes except that the names of section men and laborers will not be included until they have worked a total of six (6) months or more within a period of two (2) consecutive years. During this accumulative period section men and laborers will however, be permitted to exercise such seniority as they may have acquired.

Roster Revision

Rule 12

Rosters will be revised in June of each year and held open for correction for a period of sixty (60) days from date posted in toolhouses or headquarters of each gang. If request for correction is not received by the supervisory officers under whose jurisdiction the seniority roster is maintained within the 60-day period, the roster date will stand as permanently established unless changed by mutual agreement between the division engineer and local chairman. Corrected rosters will be posted not later than October 1 of each year.

. . . . . .

[fol. 175] *Bulletining of Positions*

Rule 14

(a) When new positions are created or when permanent vacancies occur bulletin will be posted promptly and in no

event later than five (5) days after the new positions have been created, or the vacancies occur. Such bulletin shall show the location, descriptive title, hours of service and rate of pay. Copy of bulletin shall be furnished to local chairman. The bulletin shall be posted for a period of ten (10) days at locations available to employes on the seniority district during which time the employes may file their applications with the official whose name appears on the bulletin. New positions or vacancies may be filled temporarily by the management pending permanent assignment.

(b) Temporary vacancies that are known to exceed thirty (30) days will be advertised in accordance with the above paragraph. Temporary vacancies of less than thirty (30) days, and of undetermined periods, need not be bulletined and may be filled by the Management. Such vacancies of undetermined periods that extend beyond thirty (30) days will be advertised in accordance with paragraph (a).

(c) The senior qualified applicant will be assigned to the position promptly and not later than twenty (20) days from the date the bulletin was posted.

(d) When no application for positions advertised under these rules are received from employes who are entitled to consideration, the positions may then be filled by the management with qualified employes or furloughed employes from the Maintenance of Way Department or other departments, when available. If not available, new men may be employed.

[fol. 176] (e) The name of the employe assigned to the position shall be posted at locations available to employes within the seniority district and a copy of such notice of assignment shall be furnished to local chairman.

(f) When an employe bids for and is awarded a permanent position his former position will then be declared vacant and bulletined. Such an employe is not entitled to apply for the position which has just been vacated by him, however, if the former position becomes vacant and is again bulletined his application will then be given full consideration.

(g) Positions of extra gang foremen will not be subject to bid, but when extra gangs are to be organized the extra gang foremen will be selected from qualified employes by the management. The acceptance of the position is optional with the employe.

(h) A section foreman handling a gang of seventeen (17) or more men for a period of twenty (20) consecutive working days or more will receive the extra gang foreman's rate for the period.

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[fol. 176a]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

PLAINTIFF'S EXHIBIT 7

[fol. 177]

AGREEMENT OF MAY, 1936, WASHINGTON, D. C.

This agreement is entered into between the carriers listed and defined in Appendices "A", "B" and "C" attached hereto and made a part hereof, represented by the duly authorized Joint Conference Committee signatory hereto, as party of the first part, and the employes of said carriers, represented by the organizations signatory hereto by their respective duly authorized executives, as party of the second part, and, so far as necessary to carry out the provisions hereof, is also to be construed as a separate agreement by and between and in behalf of each of said carriers and its employes who are now or may hereafter be represented by any of said organizations which now has (or may hereafter have during the life of this agreement) an agree-

ment with such carrier concerning rates of pay, rules or working conditions.

The signatories hereto, having been respectively duly authorized as aforesaid to negotiate to a conclusion certain pending issues concerning the treatment of employes who may be affected by coordination as hereinafter defined, hereby agree:

Section 1. That the fundamental scope and purpose of this agreement is to provide for allowances to defined employees affected by coordination as hereinafter defined, and it is the intent that the provisions of this agreement are to be restricted to those changes in employment in the Railroad Industry solely due to and resulting from such coordination. Therefore, the parties hereto understand and agree that fluctuations, rises and falls and changes in volume or character of employment brought about solely by other causes are not within the contemplation of the parties hereto, or covered by or intended to be covered by this agreement.

Section 2 (a). The term "coordination" as used herein means joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities.

(b) The term "carrier" as used herein when it refers to other than parties to this agreement means any carrier subject to the provisions of Part I of the Interstate Commerce Act; when it refers to a party to this agreement it means any company or system listed and described in Appendices "A", "B" or "C" as a single carrier party to this agreement.

(c) The term "time of coordination" as used herein includes the period following the effective date of a coordination during which changes consequent upon coordination are being made effective; as applying to a particular employee it means the date in said period when that employee is first adversely affected as a result of said coordination.

Section 3 (a). The provisions of this agreement shall be effective and shall be applied whenever two or more carriers parties hereto undertake a coordination; and it is understood that if a carrier or carriers parties hereto undertake a coordination with a carrier or carriers not parties hereto, such coordination will be made only upon the basis of an agreement approved by all of the carriers parties thereto and all of the organizations of employees involved (parties hereto) of all of the carriers concerned. No coordination involving classes of employees not represented by any of the organizations parties hereto shall be

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[fol. 178] undertaken by the carriers parties hereto except in accord with the provisions of this agreement or agreements arising hereunder.

(b) Each carrier listed and established as a separate carrier for the purposes of this agreement, as provided in Appendices "A", "B" and "C", shall be regarded as a separate carrier for the purposes hereof during the life of this agreement; provided, however, that in the case of any coordination involving two or more railroad carriers which also involves the Railway Express Agency, Inc., the latter company shall be treated as a separate carrier with respect to its operations on each of the railroads involved.

(c) It is definitely understood that the action of the parties hereto in listing and establishing as a single carrier any system which comprises more than one operating company is taken solely for the purposes of this agreement and shall not be construed or used by either party hereto to limit or affect the rights of the other with respect to matters not falling within the scope and terms of this agreement.

Section 4. Each carrier contemplating a coordination shall give at least ninety (90) days written notice of such intended coordination by posting a notice on bulletin boards convenient to the interested employes of each such carrier and by sending registered mail notice to the representatives of such interested employes. Such notice shall contain a full and adequate statement of the proposed changes to be effected by such coordination, including an estimate of the number of employes of each class affected by the in-

tended changes. The date and place of a conference between representatives of all the parties interested in such intended changes for the purpose of reaching agreements with respect to the application thereto of the terms and conditions of this agreement, shall be agreed upon within ten (10) days after the receipt of said notice, and conference shall commence within thirty (30) days from the date of such notice.

Section 5. Each plan of coordination which results in the displacement of employes or rearrangement of forces shall provide for the selection of forces from the employes of all the carriers involved on bases accepted as appropriate for application in the particular case; and any assignment of employes made necessary by a coordination shall be made on the basis of an agreement between the carriers and the organizations of the employes affected, parties hereto. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13.

Section 6 (a). No employee of any of the carriers involved in a particular coordination who is continued in service shall, for a period not exceeding five years following the effective date of such coordination, be placed, as a result of such coordination, in a worse position with respect to compensation and rules governing working conditions than he occupied at the time of such coordination so long as he is unable in the normal exercise of his seniority rights under existing agreements, rules and practices to obtain a position producing compensation equal to or exceeding the compensation of the position held by him at the time of the particular coordination, except however, that if he fails to exercise his seniority rights to secure another available position, which does not require a change in residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of

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[fol. 179] the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position which he elects to decline.

(b) The protection afforded by the foregoing paragraph shall be made effective whenever appropriate through what

is hereby designated as a "displacement allowance" which shall be determined in each instance in the manner hereinafter described. Any employee entitled to such an allowance is hereinafter referred to as a "displaced" employee.

(c) Each displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employee and his total time paid for during the last twelve (12) months in which he performed service immediately preceding the date of his displacement (such twelve (12) months being hereinafter referred to as the "test period") and by dividing separately the total compensation and the total time paid for by twelve, thereby producing the average monthly compensation and average monthly time paid for, which shall be the minimum amounts used to guarantee the displaced employee, and if his compensation in his current position is less in any month in which he performs work than the aforesaid average compensation he shall be paid the difference, less compensation for any time lost on account of voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but he shall be compensated in addition thereto at the rate of the position filled for any time worked in excess of the average monthly time paid for during the test period.

Section 7 (a). Any employee of any of the carriers participating in a particular coordination who is deprived of employment as a result of said coordination shall be accorded an allowance (hereinafter termed a coordination allowance), based on length of service, which (except in the case of an employee with less than one year of service) shall be a monthly allowance equivalent in each instance to sixty per cent (60%) of the average monthly compensation of the employee in question during the last twelve months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the coordination. This coordination allowance will be made to each eligible employee while unemployed by his home road or in the coordinated operation during a period beginning at the date he is first deprived of employment as a result of the coordination and extending in

each instance for a length of time determined and limited by the following schedule:

Length of Service	*Period of Payment*
1 yr. and less than 2 yrs.	6 months
2 yrs. " " " 3 "	12 "
3 yrs. " " " 5 "	18 "
5 yrs. " " " 10 "	36 "
10 yrs. " " " 15 "	48 "
15 yrs. and over	60 "

In the case of an employee with less than one year of service, the total coordination allowance shall be a lump sum payment in an amount equivalent to sixty (60) days pay at the straight time daily rate of the last position held by him at the time he is deprived of employment as a result of the coordination.

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[fol. 180] (b) For the purposes of this agreement the length of service of the employee shall be determined from the date he last acquired an employment status with the employing carrier and he shall be given credit for one month's service for each month in which he performed any service (in any capacity whatsoever) and twelve such months shall be credited as one year's service. The employment status of an employee shall not be interrupted by furlough in instances where the employee has a right to and does return to service when called. In determining length of service of an employee acting as an officer or other official representative of an employee organization he will be given credit for performing service while so engaged on leave of absence from the service of a carrier.

(c) An employee shall be regarded as deprived of his employment and entitled to a coordination allowance in the following cases:

1. When the position which he holds on his home road is abolished as result of coordination and he is unable to obtain by the exercise of his seniority rights another position on his home road or a position in the coordinated operation, or

2. When the position he holds on his home road is not abolished but he loses that position as a result of the exercise of seniority rights by an employee whose position is abolished as a result of said coordination, or by other employees, brought about as a proximate consequence of the coordination, and if he is unable by the exercise of his seniority rights to secure another position on his home road or a position in the coordinated operation.

(d) An employee shall not be regarded as deprived of employment in case of his resignation, death, retirement on pension or on account of age or disability in accordance with the current rules and practices applicable to employees generally, dismissal for justifiable cause in accordance with the rules, or furloughed because of reduction in forces due to seasonal requirements of the service; nor shall any employee be regarded as deprived of employment as the result of a particular coordination who is not deprived of his employment within three years from the effective date of said coordination.

(e) Each employee receiving a coordination allowance shall keep the employer informed of his address and the name and address of any other person by whom he may be regularly employed.

(f) The coordination allowance shall be paid to the regularly assigned incumbent of the position abolished. If the position of an employee is abolished while he is absent from service, he will be entitled to the coordination allowance when he is available for service. The employee temporarily filling said position at the time it was abolished will be given a coordination allowance on the basis of said position until the regular employee is available for service and thereafter shall revert to his previous status and will be given a coordination allowance accordingly if any is due.

(g) An employee receiving a coordination allowance shall be subject to call to return to service after being notified in accordance with the working agreement, and

such employee may be required to return to the service of the employing carrier for other reasonably comparable employment for which he is physically and mentally qualified and which does not require a change in his place of

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[fol. 181] residence, if his return does not infringe upon the employment rights of other employees under the working agreement.

(h) If an employee who is receiving a coordination allowance returns to service the coordination allowance shall cease while he is so reemployed and the period of time during which he is so reemployed shall be deducted from the total period for which he is entitled to receive a coordination allowance. During the time of such reemployment however he shall be entitled to protection in accordance with the provisions of Section 6.

(i) If an employee who is receiving a coordination allowance obtains railroad employment (other than with his 'home road' or in the coordinated operation) his coordination allowance shall be reduced to the extent that the sum total of his earnings in such employment and his allowance exceeds the amount upon which his coordination allowance is based; provided that this shall not apply to employees with less than one year's service.

(j) A coordination allowance shall cease prior to the expiration of its prescribed period in the event of:

1. Failure without good cause to return to service in accordance with working agreement after being notified of position for which he is eligible and as provided in paragraphs (g) and (h).
2. Resignation.
3. Death.
4. Retirement on pension or on account of age or disability in accordance with the current rules and practices applicable to employees generally.
5. Dismissal for justifiable cause.

Section 8. An employee affected by a particular coordination shall not be deprived of benefits attaching to his previous employment, such as free transportation, pensions, hospitalization, relief, etc., under the same conditions and so long as such benefits continue to be accorded to other employees on his home road, in active service or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

Section 9. Any employee eligible to receive a coordination allowance under section 7 hereof may, at his option at the time of coordination, resign and (in lieu of all other benefits and protections provided in this agreement) accept in a lump sum a separation allowance determined in accordance with the following schedule:

Length of Service	*Separation Allowance*
1 year & less than 2 years	3 months' pay
2 years " " 3 "	6 " "
3 " " " " 5 "	9 " "
5 " " " " 10 "	12 " "
10 " " " " 15 "	12 " "
15 years and over	12 " "

In the case of employees with less than one year's service, five days' pay, at the rate of the position last occupied, for each month in which they performed service will be paid as the lump sum.

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[fol. 182] (a) Length of service shall be computed as provided in Section 7.

(b) One month's pay shall be computed by multiplying by 30 the daily rate of pay received by the employee in the position last occupied prior to time of coordination.

Section 10 (a) Any employee who is retained in the service of any carrier involved in a particular coordination (or who is later restored to service from the group

of employees entitled to receive a coordination allowance) who is required to change the point of his employment as result of such coordination and is therefore required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects and for the traveling expenses of himself and members of his family, including living expenses for himself and his family and his own actual wage loss during the time necessary for such transfer, and for a reasonable time thereafter, (not to exceed two working days), used in securing a place of residence in his new location. The exact extent of the responsibility of the carrier under this provision and the ways and means of transportation shall be agreed upon in advance between the carrier responsible and the organization of the employee affected. No claim for expenses under this Section shall be allowed unless they are incurred within three years from the date of coordination and the claim must be submitted within ninety (90) days after the expenses are incurred.

(b) If any such employee is furloughed within three years after changing his point of employment as a result of coordination and elects to move his place of residence back to his original point of employment, the carrier shall assume the expense of moving his household and other personal effects under the conditions imposed in paragraph (a) of this section.

(c) Except to the extent provided in paragraph (b) changes in place of residence subsequent to the initial changes caused by coordination and which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this section.

Section 11 (a). The following provisions shall apply, to the extent they are applicable in each instance, to any employee who is retained in the service of any of the carriers involved in a particular coordination (or who is later restored to such service from the group of employees entitled to receive a coordination allowance) who is required to change the point of his employment as a result of such

coordination and is therefore required to move his place of residence:

1. If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by his employing carrier for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the coordination to be unaffected thereby. The employing carrier shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other party.

2. If the employee is under a contract to purchase his home, the employing carrier shall protect him against loss to the extent of the fair value of any equity he may have in the home and in addition shall relieve him from any further obligations under his contract.

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[fol. 183] 3. If the employee holds an unexpired lease of a dwelling occupied by him as his home, the employing carrier shall protect him from all loss and cost in securing the cancellation of his said lease.

(b) Changes in place of residence subsequent to the initial change caused by coordination and which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this Section.

(c) No claim for loss shall be paid under the provisions of this section which is not presented within three years after the effective date of the coordination.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of lease, or any other question in connection with these matters, it shall be decided through joint conference between the representatives of the employees and the carrier on whose line the controversy arises and in the event they

are unable to agree, the dispute may be referred by either party to a board of three competent real estate appraisers, selected in the following manner: One to be selected by the representatives of the employees and the carrier, respectively; these two shall endeavor by agreement within ten days after their appointment to select the third appraiser, or to select some person authorized to name the third appraiser, and in the event of failure to agree then the Chairman of the Interstate Commerce Commission shall be requested to appoint the third appraiser. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the salary of the appraiser selected by such party.

Section 12. If any carrier shall rearrange or adjust its forces in anticipation of a coordination, with the purpose or effect of depriving an employee of benefits to which he should be entitled under this agreement as an employee immediately affected by a coordination, this agreement shall apply to such an employee as of the date when he is so affected.

Section 13. In the event that any dispute or controversy arises (except as defined in Section 11) in connection with a particular coordination, including an interpretation, application or enforcement of any of the provisions of this agreement (or of the agreement entered into between the carriers and the representatives of the employees relating to said coordination as contemplated by this agreement) which is not composed by the parties thereto within thirty days after same arises, it may be referred by either party for consideration and determination to a Committee which is hereby established, composed in the first instance of the signatories to this agreement. Each party to this agreement may name such persons from time to time as each party desires to serve on such Committee as its representatives in substitution for such original members.

Should the Committee be unable to agree, it shall select a neutral referee and in the event it is unable to agree

—7—

[fol. 184] within 10 days upon the selection of said referee, then the members on either side may request the National Mediation Board to appoint a referee. The case shall again be considered by the Committee and the referee and the decision of the referee shall be final and conclusive. The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

Section 14. Any carrier not initially a party to this agreement may become a party by serving notice of its desire to do so by mail upon the members of the Committee established by Section 13 hereof. It shall become a party as of the date of the service of such notice or upon such later date as may be specified therein.

Section 15. This agreement shall be effective June 18, 1936, and be in full force and effect for a period of five years from that date and continue in effect thereafter with the privilege that any carrier or organization party hereto may then withdraw from the agreement after one year from having served notice of its intention so to withdraw; provided, however, that any rights of the parties hereto or of individuals established and fixed during the term of this agreement shall continue in full force and effect, notwithstanding the expiration of the agreement or the exercise by a carrier or an organization of the right to withdraw therefrom.

This agreement shall be subject to revision by mutual agreement of the parties hereto at any time, but only after the serving of a sixty (60) days notice by either party upon the other.

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[fol. 185]

NEW ORLEANS UNION PASSENGER TERMINAL CASE

Finance Docket No. 15920

Decided January 16, 1952

. . . From the beginning, we have patterned the conditions which we prescribed after the Washington Agreement. Since the enactment of section 5(2) (f), the conditions prescribed by us differed from that agreement as to when the protection afforded was to begin, the duration thereof, and the amount of the annual allowance to be made because all such matters were regarded as being fixed by the statute. Under the circumstances here present, some additional protection for the employes involved must be afforded. In our opinion the Washington Agreement, subject to the limitations later shown, would provide the fair and equitable arrangement contemplated by the statute.

One provision of the Washington Agreement, to which specific objection has been raised by the applicants has never had our approval. It provides, in effect, that the coordination allowance to which an employe is entitled in case of dismissal will be reduced by the amount of compensation he receives from other railroad employment, but not otherwise. We have consistently required that there be appropriate deductions for earnings in all outside employment. See *Chicago R. I. & G. Ry. Co. Trustees Lease, supra, Texas & P. Ry. Co. Operation*, 247 I.C.C. 285, *Chicago M., St. P. & P. R. Co. Trustees Construction*, 252 I.C.C. 49 and 287, *Chicago & N. W. Ry. Co. Trustees Abandonment*, 254 I.C.C. 820 (not printed in full), *Oklahoma Ry. Co. Trustees Abandonment, supra*, and *Chicago, B. & Q. R. Co. Abandonment*, 257 I.C.C. 700. Accordingly, all earnings from outside employment should be included in computing any employe allowances which may be provided herein. Condition No. 5 of *Oklahoma Ry. Co. Trustees Abandonment, supra*, which relates to compensation for dismissed employes contains the following pertinent provision:

> The dismissal allowance of any dismissed employe who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. * * *

The dismissal allowance, as used in the foregoing, has the same meaning as coordination allowance, as used in the Washington Agreement.

Based upon the conclusions stated herein and consistent with the circumstances in this proceeding and in conformity with the decision of the Supreme Court of the United States in *Railway Labor Assn.* v. *U. S.*, *supra*, we find that a fair and equitable arrangement for protecting the interests of the employes adversely affected by the transaction herein will be provided by applying the terms of the Washington Agreement of May 21, 1936, subject to the following limitations or restrictions:

(a) That employes adversely affected within 4 years from the effective date of the order approving the transaction shall receive as a minimum the protection afforded by conditions 4 to 9, inclusive, in *Oklahoma Ry. Co. Trus-*

[fol. 186] *tees Abandonment*, 257 I.C.C. 177 (197-201), as prescribed in the report and order approving the transaction, for the period they are adversely affected prior to May 17, 1952 (4 years from the effective date of the order of approval), and any such employe so adversely affected who has received under such conditions total dismissal or displacement compensation less than that which he would receive by applying the Washington Agreement, as limited, for the full protective period therein provided from the time he is first adversely affected, shall continue to receive benefits under the terms of the Washington Agreement, as limited, until the total compensatory benefits provided therein for his particular period of service have been paid.

(b) That in applying the Washington Agreement the coordination allowance provided therein for dismissed employes shall be reduced with respect to any employe who is otherwise employed to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his coordination allowance, exceed the amount upon which his coordination allowance is based; such employe or his representative, and the carriers, to agree upon a procedure by which the carriers shall be currently informed of the wages earned by such employe in employment other than with the carriers, and the benefits received.

The intent and effect of the foregoing findings are that all employes adversely affected by the transaction involved should receive the protection afforded by the Washington Agreement, reduced as to dismissed employes to the extent that they receive compensation in other employment or under unemployment insurance laws; and that employes adversely affected prior to May 17, 1952 (4 years from the effective date of the order of approval) are to receive as a minimum the protection afforded by the Oklahoma Conditions as prescribed in the previous report for the period they are adversely affected prior to May 17, 1952, but if the total amount of such compensation is less than they would receive under the Washington Agreement, as limited, applied from the date of adverse affect, then they are entitled to the remaining benefits they would have enjoyed under the latter. While it is unlikely under the existing circumstances that the situation will arise, should the amount of compensation to which an employe is entitled under the original Oklahoma conditions applied to May 17, 1952, equal or exceed the amount to which he would be entitled under the Washington Agreement, as limited, then he would be entitled to nothing under the latter.

An appropriate order will be entered.

COMMISSIONER CROSS did not participate in the disposition of this proceeding.

[fol. 187]

CONDITIONS FOR PROTECTION OF EMPLOYES, COMMONLY REFERRED TO AS THE "OKLAHOMA CONDITIONS," PRESCRIBED BY THE I.C.C. IN ITS ORDER ISSUED MAY 17, 1944 IN FINANCE DOCKET 14221, OKLAHOMA RAILWAY COMPANY TRUSTEES ABANDONMENT OF OPERATION, ETC.

4. If, as a result of the abandonment of operation herein permitted and the purchases, etc., herein authorized, hereinafter referred to as the transaction, any employee of Robert K. Johnston and A. C. DeBolt, trustees of the Oklahoma Railway Company, of The Atchison, Topeka and Santa Fe Railway Company, or of Joseph B. Fleming and Aaron Colnon, trustees of The Chicago, Rock Island and Pacific Railway Company, hereinafter respectively referred to as the Oklahoma, the Santa Fe and the Rock Island, and collectively as the carriers, is displaced, that is placed in a worse position with respect to his compensation and rules governing his work conditions, and so long thereafter as he is unable, in the exercise of his seniority rights under existing agreements, rules, and practice, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the monthly compensation received by him in the position from which he was displaced. The latter compensation is to be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of this transaction (thereby producing average monthly compensation and average monthly time paid for in the test period). If his compensation in his retained position in any month is less than the aforesaid average compensation in the test period, he shall be paid the difference, less compensation at the rate of the position from which he was displaced for time lost on account of his voluntary absences in his retained or current position,

but if in his retained position he works in any month in excess of the average monthly time paid for in the test period, he shall be compensated for the excess time at the rate of pay of the retained position; provided, however, that nothing herein shall operate to affect in any respect the retirement on pension or annuity rights and privileges in respect of any employee, provided, further, that if any employee elects not to exercise his seniority rights he shall be entitled to no allowance, and provided, further, that no allowance shall be paid to any Oklahoma employee who fails to accept employment, with seniority rights in Oklahoma City, Oklahoma, with the Santa Fe or Rock Island if either of said two last named carriers offers him a position, the duties of which he is qualified to perform. The period during which this protection is to be given, hereinafter called the protective period, shall extend from the date on which the employee was displaced to the expiration of 4 years from the effective date of our order herein; provided, however, that such protection shall not continue for a longer period following the effective date of our order herein than the period during which such employee was in the employ of the carriers prior to the effective date of our order.

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[fol. 188] 5. If, as a result of the transaction herein approved, any employee, hereinafter referred to as a dismissed employee, of the carriers is deprived of employment with said carriers because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as result of the transaction herein approved, he shall be accorded a monthly dismissal allowance equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of this transaction. This allowance shall be made during the protective period to each dismissed employee while unemployed, provided, however, that no such allowance shall be paid to any Oklahoma employee who fails to accept employment, with seniority rights in Oklahoma City, Okla., with the Santa Fe or Rock Island, if

either of said two last named carriers offers him a position, the duties of which he is qualified to perform.

The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the carriers, should agree upon a procedure by which the carriers shall be currently informed of the wages earned by such employee in employment other than with the carriers, and the benefits received.

The dismissal allowance shall cease prior to the expiration of the protective period in the event of the failure of the employee without good cause to return to service after being notified by the carriers of a position, the duties of which he is qualified to perform and for which he is eligible, or in the event of his resignation, death, retirement on pension, or dismissal for good cause.

6. No employee affected by the transaction approved herein shall be deprived during the protective period of benefits attached to his previous employment, such as free transportation, pensions, hospitalization, relief, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees on his home road, in active service or on furlough, as the case may be, to extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

7. Any employee retained in the services of the carriers involved in the transaction herein approved or who is later restored to service after being entitled to receive a dismissal allowance, and required to change the point of his employment as a result of the transaction, and within the protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects, for the traveling expenses of himself and his immediate family, and for his own actual wage loss, not to exceed 2 days, the exact extent of the responsibility of the carriers to be agreed upon in

advance by the said carriers and the employees affected; provided, however, that changes in place of residence, subsequent to the initial change caused by the transaction, which result from the exercise by the employee of his seniority rights shall not be considered as within the foregoing provision.

8. In the event that any dispute or controversy arises with respect to the protection afforded by the foregoing Conditions Nos. 4, 5, 6, and 7, which cannot be settled by

[fol. 189] the carriers and the employee, or his authorized representatives, within 30 days after the controversy arises, it may be referred by either party, to an arbitration committee for consideration and determination, the formation of which committee, its duties, procedure, expenses, et cetera, shall be agreed upon by the carriers and the employee, or his duly authorized representatives.

9(a) The following condition shall apply, to the extent it is applicable in each instance, to any employee who is retained in the service of any of the carriers (or who is later restored to service after being entitled to receive a dismissal allowance), who is required to change the point of his employment within the protective period as a result of the transaction herein approved and is therefore required to move his place of residence:

1. If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by his employing carrier for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to May 17, 1943, to be unaffected by the filing of the applications herein. The employing carrier shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

2. If the employee is under a contract to purchase his home, the employing carrier shall protect him against loss to the extent of the fair value of any equity he may

have in the home and in addition shall relieve him from any further obligation under the contract.

3. If the employee holds unexpired lease of a dwelling occupied by him as his home, the employing carrier shall protect him from all loss and cost in securing the cancellation of his said lease.

(b) Changes in place of residence subsequent to the initial change caused by the consummation of the transaction herein approved and which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this condition.

(c) No claim for loss shall be paid under the provisions of this condition which is not presented within one year after the date employee is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of lease, or any other question in connection with these matters, it shall be decided through joint conference between the representatives of the employees and the carrier on whose line the controversy arises and in the event they are unable to agree, the dispute may be referred by either party to a board of three competent real estate appraisers, selected in the following manner: One to be selected by the representatives of the employees and the carrier, respectively, and these two shall endeavor by agreement within ten days after their appointment to select the third appraiser, or to select some person authorized to name the third appraiser. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expense of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

[fol. 190] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 20575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES and RAILWAY LABOR EXECUTIVES' ASSOCIATION, Intervenor, Plaintiffs,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY and ERIE RAILROAD COMPANY, Intervenors, Defendants.

TEMPORARY RESTRAINING ORDER—October 14, 1960

At a session of said Court held at Detroit, Michigan, on the 14th day of October, 1960.

Present Honorable Thomas P. Thorton, District Judge.

Plaintiff Brotherhood of Maintenance of Way Employes having filed its complaint challenging an order of the defendant Interstate Commerce Commission (entered September 13, 1960 effective October 15, 1960) approving of a merger of the Delaware, Lackawanna and Western Railroad Company and the Erie Railroad Company, and said railroad companies having intervened as additional parties defendant and the Railway Labor Executives' Association having intervened as an additional party plaintiff, and said plaintiffs having applied for the issuance of an order restraining the operation of the said merger order until plaintiff's application for an interlocutory injunction can be heard and determined by a three-judge court in accordance with 28 USC §§2284 and 2335, all of the defendants having been given notice of the hearing on said application for restraining order, said

application having come on for hearing, evidence having been taken and counsel for all of the parties having been heard, and

Plaintiffs having requested that said merger order be [fol. 191] restrained only insofar as it adversely affects the employment of employees represented by Plaintiffs, and.

Plaintiffs and said railroad defendants having agreed that on October 17, 1960 the merged company, Erie-Lackawanna Railroad Company (Erie-Lackawanna) will take into its active employment all employees of the Erie Railroad Company and the Delaware, Lackawanna and Western Railroad Company, represented by the Brotherhood of Maintenance of Way Employees (BOMW) or any other labor organization whose chief executive is a member of the Railway Labor Executives Association (RLEA), who had an active employment status (i.e. not on furlough) on October 12, 1960; this provision not to adversely affect the rights of employees of the Erie or the Lackawanna represented by said BOMW or any other labor organization whose chief executive is a member of RLEA who were on furlough on October 12, 1960

It Is Ordered That:

The Erie-Lackawanna shall not abolish the position of, or furlough, any employee represented by said BOMW or any other labor organization whose chief executive is a member of RLEA who had an active employment status with either the Erie or the Lackawanna railroad companies on October 12, 1960, by reason of the merger of these railroad companies, pending the entry of further order by this court, sitting as a statutory three-judge court in this proceeding.

This restraining order shall not prevent the Erie-Lackawanna from consolidating any functions of the merged company and transferring such positions as are required for such consolidations, but no employee of the Erie or of the Lackawanna represented by said BOMW or any other labor organization whose chief executive is a member of RLEA holding an active employment status on October

12, 1960 shall be required to transfer his place of employment pending the entry of a further order by this court sitting as a statutory three-judge court in this proceeding, except pursuant to the terms of an interim and/or implementing agreement with the appropriate collective bargaining representative representing such employee pur- [fol. 192] suant to the provisions of the Railway Labor Act, provided, that nothing in this order shall supersede any interim and/or implementing agreement which heretofore may have been entered into between the Erie and/or the Lackawanna and any such collective bargaining representative.

The Court specifically finds that unless this restraining order is issued, irreparable damage will result to the employees represented by said plaintiffs, which finding is based upon the testimony and exhibits of Harold C. Crotty that the merger, if not so restrained, will cause the dislocation and displacement of some of such employees by the abolition of employment, the required exercise of seniority rights, the movements of employees and their families, and the loss of fringe benefits and annuity rights by some employees and that if such effects are not restrained it will be impossible to subsequently restore the status quo.

Thomas P. Thornton, District Judge.

[fol. 193] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
Civil Action No. 20575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES and RAILWAY LABOR EXECUTIVES' ASSOCIATION, Intervenor, Plaintiffs,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY and ERIE RAILROAD COMPANY, Intervenors, Defendants.

ORDER AUTHORIZING SUBSTITUTION AND REDESIGNATION OF PARTIES—October 27, 1960

At a session of said Court held in the Federal Building, Detroit, Michigan on October 27, A. D. 1960.

Present: The Honorable Thomas P. Thorton, District Judge.

Upon Motion of Erie-Lackawanna Railroad Company and the consent thereto by Plaintiffs and Defendants, United States of America and Interstate Commerce Commission, and this Court being fully advised in the premises,

It Is Ordered That:

(1) Erie-Lackawanna Railroad Company be and is hereby designated as intervening defendant in the place and stead of Erie Railroad Company and The [fol. 194] Delaware, Lackawanna and Western Railroad Company,

(2) the title of this action be amended accordingly and

(3) the action otherwise be continued without prejudice to any proceedings already had therein.

Thomas P. Thornton, District Judge.

[fol 195] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 20575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, Plaintiff,

—and—

RAILWAY LABOR EXECUTIVES ASSOCIATION,
Intervener Plaintiff,

—against—

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants,

—and—

ERIE-LACKAWANNA RAILROAD COMPANY,
Intervener Defendant.

AMENDED ANSWER OF INTERVENER DEFENDANT ERIE-LACKAWANNA RAILROAD COMPANY—Filed October 31, 1960

Now Comes Erie-Lackawanna Railroad Company, intervener-defendant in the above-entitled cause by virtue of an Order authorizing the intervention of The Delaware, Lackawanna and Western Railroad Company and Erie Railroad Company, its predecessors in interest, dated and filed October 10, 1960, and a further Order dated and filed October 27, 1960, ordering the substitution of Erie-Lackawanna Railroad Company as successor in interest to The Delaware, Lackawanna and Western Railroad Company and Erie Railroad Company, by their undersigned attorneys

and makes its amended answer to the complaint herein as follows:

[fol. 196] (1) In response to paragraph 5, states that The Delaware, Lackawanna and Western Railroad Company and Erie Railroad Company had collective bargaining agreements with the Brotherhood of Maintenance of Way Employees (BMWE), which agreements speak for themselves and refers to said agreements for the terms and provisions thereof.

(2) In response to paragraph 6, admits that the Railway Labor Executives Association (RLEA) was an intervening party before the Interstate Commerce Commission in Finance Docket No. 20707, but neither admits nor denies that the RLEA represented the interests of any of the employees of Erie Railroad Company or The Delaware, Lackawanna and Western Railroad Company.

(3) In response to paragraph 8, admits the allegations therein, except for the accuracy of the specific figures set forth in the last sentence thereof.

(4) In response to paragraph 9, admits that RLEA intervened in the proceedings before the Commission hereinabove described, but neither admits nor denies that RLEA represented the chief executive officers of railway labor unions in that proceeding and further denies each and every other allegation contained therein.

(5) In response to paragraphs 10, 11, 12, 14 and 15, denies each and every allegation contained therein.

(6) In response to paragraph 13, denies each and every allegation contained therein, except with respect to the submission of Exhibit No. H-48, and further states that such exhibit speaks for itself.

(7) In response to paragraph 16, denies that plaintiffs pursued their administrative remedies before the Commis-
[fol. 197] sion and, further, specifically denies that BMWE, RLEA or any former employees of The Delaware, Lackawanna and Western Railroad Company or Erie Railroad Company, or present employees of Erie-Lackawanna Rail

road Company, allegedly represented by them herein have no adequate remedy at law.

Wherefore, Erie-Lackawanna Railroad Company requests that this Court deny each and all of the plaintiff's and intervener plaintiff's requests for relief and dismiss this action with prejudice and that the Court grant such other and further relief as to it may seem just.

Rowland L. Davis, Jr., 140 Cedar Street, New York 6, New York.

Cravath, Swaine & Moore, by Ralph L. McAfee, A Member of the Firm, 15 Broad Street, New York 5, New York.

Bodman, Longley, Bogle, Armstrong & Dahling, by Richard D. Rohr, A Member of the Firm, 1400 Buhl Building, Detroit 26, Michigan.

Attorneys for Intervener Defendant.

Dated: October 27, 1960

[fol. 198] *Duly sworn to by Rowland L. Davis, Jr., jurat omitted in printing.*

[fol. 199]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

Civil Action No. 20575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, Plaintiff,

v.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, Defendants.

JOINT ANSWER OF THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION
—Filed November 3, 1960

The United States of America and the Interstate Commerce Commission, defendants in the above-styled proceeding, for answer to the complaint say:

I.

Admit the allegations of paragraphs 1 and 2, which allege that this is an action to set aside, enjoin, suspend and annul an order of the Commission as stated therein, pursuant to provisions 28 U.S.C. 1336, 1398, 2321-2325 and 2284 inclusive.

II.

Neither admit nor deny the allegations in paragraphs 3, 4, 5, and 6 for lack of sufficient information to form a belief thereon, except that it is admitted that RLEA was an intervening party in Interstate Commerce Commission Finance Docket 20707.

III.

Admit the allegations of paragraph 7 and add that the Interstate Commerce Commission is a defendant by right pursuant to 28 U.S.C. 2223.

[fol. 200]

IV.

Admit the allegations of paragraph 8 except that the accuracy of the specific figures set forth in the last sentence is neither admitted nor denied.

V.

Answering the allegations of paragraphs 9 through 13, defendants aver that the matters set forth therein, except for the first sentence of paragraph 9, and paragraph 10, are conclusions of law, argumentative in nature, requiring no answer; and admit the allegations of the first sentence of paragraph 9, and those of paragraph 10 to the extent that it properly sets out the text of Section 5(2)(f) of the Interstate Commerce Act which is involved in the action of the Commission here in issue.

VI.

Deny each and every allegation of paragraphs 14, 15 and 16, except that they admit that the plaintiffs are now entitled to maintain this action as to matters which they raised before the Commission.

VII.

Except as expressly admitted herein, each and every allegation of the complaint is denied.

Richard H. Stern, Attorney, Department of Justice, Washington 25, D. C., Robert A. Bicks, Assistant Attorney General, Attorneys for United States of America.

Leonard S. Goodman, Attorney, Interstate Commerce Commission, Washington 25, D. C., Robert W. Ginnane, General Counsel, Attorneys for Interstate Commerce Commission.

[fol. 201] Certificate of Service (omitted in printing).

[fol. 202] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

Civil Action No. 20575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, Plaintiff,

—and—

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Intervenor Plaintiff,

—against—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants,

—and—

ERIE-LACKAWANNA RAILROAD COMPANY,
Intervenor Defendant.

STIPULATION OF COUNSEL RE RECORD—November 4, 1960

In view of the issue raised by the complaint herein, only a limited portion of the record before the Interstate Commerce Commission in the proceeding known as Finance Docket No. 20707 is required to be brought before the Court, and accordingly

It Is Hereby Stipulated and Agreed that the following nine items shall constitute all of the record before the Interstate Commerce Commission required to be brought before the Court on appeal in this proceeding and that the same need not be certified:

(1) the joint application of the petitioners, The Delaware, Lackawanna and Western Railroad Company and the Erie Railroad Company in Finance Docket No. 20707;

(2) the returns to questionnaire filed by The Delaware, Lackawanna and Western Railroad Company and Erie Railroad Company in Finance Docket No. 20707;

[fol. 203] (3) the petition of the Railway Labor Executives' Association to intervene in Finance Docket No. 20707;

(4) the order permitting the Railway Labor Executives' Association to intervene in Finance Docket No. 20707;

(5) the direct testimony of William Wyer in Finance Docket No. 20707 with respect to the issue raised by the complaint herein, including his statement G and the cross-examination of William Wyer on behalf of Railway Labor Executives' Association, being pages 122-123, 611-635 of the Transcript, in Finance Docket No. 20707;

(6) Wyer's Exhibit H-48;

(7) oral argument in Finance Docket No. 20707 before the full Commission on behalf of the Railway Labor Executives' Association and on behalf of the Erie Railroad Company and The Delaware, Lackawanna and Western Railroad Company, with respect to the issue raised by the complaint herein, being pages 1731-1740, 1771-1792, 1792-1799, 1805-1806, of the Transcript;

(8) Examiner's Proposed Report in Finance Docket No. 20707 served March 30, 1960; and

(9) Report of the Commission and Certificate and Order, dated September 13, 1960, in Finance Docket No. 20707.

It Is Further Hereby Stipulated and Agreed that after the record in Finance Docket No. 20707 was closed on October 22, 1959, Railway Labor Executives' Association raised before the Hearing Examiner in a brief filed on November 23, 1959 and later before the Interstate Commerce Commission the sole issue to be litigated in this action, namely, the interpretation of the mandatory requirements of Section 5(2)(f).

Dated: November 4, 1960.

George E. Brand, George E. Brand, Jr., William G. Mahoney, Counsel for Brotherhood of Maintenance of Way Employes, By George E. Brand.

[fol. 204] George E. Brand, George E. Brand, Jr., William G. Mahoney, Counsel for Railway Labor Executives' Association, By George E. Brand.

Richard H. Stern, Counsel for United States of America.

Robert W. Ginnane, Counsel for Interstate Commerce Commission.

Richard D. Rohr, Counsel for Erie-Lackawanna Railroad Company.

So Ordered:

Thomas P. Thornton, U.S.D.J.

[fol. 205] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

Civil Action No. 20575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, Plaintiff,

—and—

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Intervenor Plaintiff,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants,

—and—

ERIE-LACKAWANNA RAILROAD COMPANY,
Intervenor Defendant

Transcript of Proceedings—November 15, 1960

Proceedings had in the above-entitled matter at Detroit, Michigan, on Tuesday, November 15, 1960, at nine-thirty o'clock in the forenoon.

Before:

Hon. Clifford O'Sullivan, Judge, United States Court of Appeals, Sixth Circuit.

Hon. Theodore Levin, Chief Judge, United States District Court, Eastern District of Michigan.

Hon. Thomas P. Thornton, Judge, United States District Court, Eastern District of Michigan.

[fol. 206]

APPEARANCES:

William G. Mahoney, Esq., George E. Brand, Esq., and George E. Brand, Jr., Esq., Appearing on behalf of the Plaintiff.

Richard Stern, Esq., and Orrin C. Jones, Appearing on behalf of the Defendant, United States of America.

Robert W. Ginnane, Esq., Appearing on behalf of the Defendant, Interstate Commerce Commission.

Rowland L. Davis, Jr., Esq., Messrs. Bodman, Longley, Bogle, Armstrong & Dahling (By Richard D. Rohr, Esq.), Appearing on behalf of the Intervenors, Delaware, Lackawanna & Western Railroad Company and Erie Railroad Company.

[fol. 207] COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Rohr: For the Erie-Lackawanna.

There are at least a couple of matters which you might like to clarify in the interest of proper and orderly procedure.

First of all, a record was submitted to this Court last week which contained various materials submitted to the [fol. 208] Commission. Subsequently, in the brief of the RLEA, numerous factual statements are made which have no support in that record, and a memorandum was delivered to us the other day which supported this extrapolation of the evidence and record before this Court.

I think, perhaps, Mr. Ginnane of the ICC and I would both be interested in speaking in response to that memorandum and ascertaining at the outset just what is before this Court in the way of a record, and what is properly before the Court.

Hon. Clifford O'Sullivan: Well, at the moment we, of course, have the—at least as far as has been delivered to me—we have the pleadings in this case, and I assume those pleadings, by reference, to include the record that was made before the Interstate Commerce Commission, the hearing.

Mr. Rohr: Yes.

Hon. Clifford O'Sullivan: Then, also, there has been delivered the pleadings that were part of the record of the Interstate Commerce Commission.

Mr. Rohr: That is correct.

Hon. Clifford O'Sullivan: The petition, and that sort of thing. And various reports, and an intermediate report.

I don't understand that we have yet had submitted to us [fol. 209] a transcript of the evidence of witnesses.

Now, I assume that if any party wishes this Court to consider directly parts of the transcript, at least they should be pointed out to the Court; and, if the other party feels that that calls for them calling this Court's attention to additional parts of the transcript, they will do so.

However, may I ask this question: do counsel here involved believe that this Court as composed is going to in any way have to resolve issues of fact beyond possibly drawing some inferences from agreed facts?

Mr. Mahoney: No, your Honor.

Mr. Rohr: No. We believe that an issue of law is here involved, purely and simply. However, the stipulation was to that effect.

However, the brief filed by the RLEA is replete with various factual references to a transcript made before Judge Thornton on October 12th which we believe is not properly before the Court in connection with the narrow issues of law involved.

Hon. Clifford O'Sullivan: Of course, Judge Thornton would be aware of that. But, as I understand it, whatever evidence was offered before Judge Thornton related to the application for restraint.

Mr. Rohr: It spoke solely to that point, yes.

[fol. 210] Hon. Clifford O'Sullivan: I think we ought to understand that. Even though that evidence was additional to evidence that was offered before the Interstate Commerce Commission, your position is that that evidence could not be considered by us on the point of the final decision, or our disposition of the Interstate Commerce Commission's Order?

Mr. Ginnane: That is correct, sir. It is our position that, now that your Honors are convened to determine the validity of the Commission's Order on its merits, that that determination should be made, under a great mass of authority, solely on the record made before the Commission.

Now, in support of his memorandum that the testimony of Mr. Crotty before Judge Thornton now, at this point, be made a part of the record before the Court, plaintiffs have submitted a memorandum in which they rely heavily upon a so-called Idaho case.

Hon. Clifford O'Sullivan: A so-called what?

Mr. Ginnane: Idaho case. United States vs. State of Idah

Hon. Thomas P. Thornton: I am just distributing some briefs that came in after I distributed the original pleadings and briefs.

Mr. Ginnane: With the Court's permission, I would like [fol. 211] to submit to the Court copies of a hastily-prepared memorandum in response to the plaintiff's memorandum.

Hon. Clifford O'Sullivan: You may submit those. You will serve them on counsel, I assume.

(Documents were thereupon handed by Mr. Ginnane to the Court and counsel.)

Hon. Clifford O'Sullivan: Do you think we better rule upon the question of whether or not this Court's consideration in this matter is to be limited to the record made before the Interstate Commerce Commission, unaided or unaffected by oral testimony that may have been given to support the application?

Mr. Ginnane: We respectfully urge the Court to do that.

Hon. Clifford O'Sullivan: What is plaintiffs' position in that connection?

Mr. Mahoney: Your Honor, we feel this way about it: this Complaint asks, in addition to a temporary restraining order, which was issued, a temporary injunction and permanent injunction.

Now, of course, Mr. Crotty's testimony as to the effect of the Commission's Order on employes would be as pertinent and applicable to our request for a temporary and permanent injunction as it was to a temporary restraining order. That is our first point.

[fol. 212] And, therefore, we feel certainly, insofar as that request of the Complaint is concerned, that his testimony could and should be considered by the Court here.

Secondly, we feel that the testimony of Mr. Crotty which related to the effect of the ICC Order on the employes and the practical effect of these compensation protective conditions for employes which the Commission imposed, that his testimony as to that should also be considered here because it merely amplifies what was already in the record, and that is the basis of the citation of the Idaho case, as Mr. Ginnane characterized it.

There the Court said—

Hon Clifford O'Sullivan: (Interposing) The Idaho case, is this an authority cited in a recently filed brief?

Mr. Mahoney: Yes.

Hon. Clifford O'Sullivan: Have we got that? Is that among your things—

Mr. Mahoney: (Interposing) Yes, your Honor.

Hon. Thomas P. Thornton: That is the one that came in yesterday?

Mr. Mahoney: No, your Honor. That was submitted several days ago.

Hon. Thomas P. Thornton: It takes quite a lot of research to keep them lined up here.

[fol. 213] Mr. Mahoney: It is the United States against the State of Idaho.

Hon. Clifford O'Sullivan: Is that among the papers we have in front of us?

Mr. Mahoney: Yes.

Hon. Clifford O'Sullivan: Mr. Mahoney, let me ask this, and I think it may clarify my thinking—I can't speak for the other members of the Court—but, isn't our job in this case to determine what Congress said or meant when it passed the statute?

Mr. Mahoney: Yes, your Honor.

Hon. Clifford O'Sullivan: And, while it may be interesting, do you think that the economic consequences of the enforcement of that statute should be controlling in trying to arrive at the meaning of the statute?

Mr. Mahoney: No, your Honor, I don't think that is necessary.

As I said in our brief, the only reason I referred to Mr. Crotty's testimony was to make the Court aware of the effect of these conditions, and the effects of job abolishment and transfer, which the Commission was well aware of and which all the parties were well aware of.

We all know what happens under these conditions; we all know what happens when jobs are abolished and transferred as a result of economic conditions, and so forth. [fol. 214] And the only reason it was put in the brief was merely to acquaint the Court with those facts.

Hon. Clifford O'Sullivan: Wasn't that the purpose of urging to Judge Thornton the importance and great necessity of a restraining order?

Mr. Mahoney: Oh, yes.

Hon. Clifford O'Sullivan: And does it add anything to the merits of your contention as to what the statute says or means?

Mr. Mahoney: No, sir, it does not. Except, as I say, for our other request here for the temporary injunction and permanent injunction, which we request be issued if the plaintiffs prevail, and I think to that extent it would support the issuance of such an injunction and would be necessary.

Hon. Thomas P. Thornton: Here is the way the matter appeals to me: At the time of the hearing on the application for temporary restraint I tried to impress upon everybody the fact that the determination was going to be made by the three-Judge Court. This three-Judge Court, as I see it, has not asked for any testimony to assist us in our

determination, and until that is done I don't think it is admissible, myself.

If we feel the need, as I understand it, of testimony to assist us in making a determination, why, then we could [fol. 215] call upon it. But this three-Judge Court hasn't done that.

Mr. Mahoney: As I say, the only point would be that if the plaintiffs were to prevail on the merits of this case, then it seems to me that the Court would have to rely on the testimony of Mr. Crotty in order to issue a temporary injunction or permanent injunction—I may be in error on that—but that is the purport of our request here.

Mr. Rohr: If the—

Hon. Clifford O'Sullivan: (Interposing) Excuse me just one moment. (Conferring privately with Judges Levin and Thornton.)

Well, speaking for myself—and I do not necessarily express the view of all the Court, although I think for the moment we are agreed upon how we should proceed—at least it impresses me that this matter before us should be decided, disposed of on the record before the Interstate Commerce Commission. We do have now whatever testimony was offered before Judge Thornton to support the application for restraint. We would like to proceed now with this hearing.

If it is the consensus of the members of this Court, after listening to arguments on both sides, that any of the evidence before Judge Thornton should be considered by us in disposing of the matters that are going to be before us, [fol. 216] we will advise the respondents, and if they then wish to apply to us for the right to offer evidence to meet the factual contentions that are supported by the transcript before Judge Thornton, we will have to set a time for hearing.

Mr. Rohr: Thank you. Might I ask one more question? The issue—and this is an effort to refine the issue before the Court—I am still unclear from the RLEA brief whether they are arguing that John Jones who was employed for three months, hired in before the merger, is entitled to a job freeze for four years thereafter?

Such argument was made before the Commission.

Throughout their brief there is a reference to a four-year period.

Could you enlighten us, Mr. Mahoney, as to whether—

Hon. Clifford O'Sullivan: (Interposing) Let me say this: why don't we hold that, and I think that will probably be taken care of by the argument.

Mr. Brand: May I ask your Honors a question?

Hon. Clifford O'Sullivan: Yes.

Mr. Brand: Is it understood we have the benefit of an offer of the transcript of Crotty's testimony? If not, we would like to offer the transcript.

[fol. 217] And I would like to say one more word about the admissibility of that, if you will permit me. In the brief we filed, a two-page brief, we cite this Idaho case, and may I read you two sentences of it?

(Reading):

"The decree should be affirmed, because on findings amply supported by the evidence the trackage is a spur. Appellants object that, since the findings and order of the Interstate Commerce Commission were made on substantial evidence, they are conclusive, and that it was error to admit the testimony first offered in the District Court. * * * Although it would have been better practice to have introduced all relevant evidence before the Commission, as appellee's counsel concede, the Court did not err in admitting the additional testimony."

And this is the important part.

(Continuing reading):

"For whether certain trackage is a 'spur' is a mixed question of fact and law left by Congress to the decision of a Court—not to the final determination of either the federal or a state commission."

[fol. 218] Now, our point is that Mr. Crotty's testimony merely amplifies what is in the record before the Commission in many, many places. We have prepared a memorandum pointing out the places where the things

that Mr. Crotty testified to are raised and exposed in the record.

The Supreme Court, in the case that I just read, referred to the fact that the District Judges in admitting that testimony held, and properly held, that what was being offered was merely an amplification of what was already in the record.

Hon. Clifford O'Sullivan: Mr. Brand, was that testimony before Judge Thornton offered for the purpose of amplifying and supplementing?

Mr. Brand: Yes.

Hon. Clifford O'Sullivan: Was it? Or was it offered solely for the application?

Mr. Brand: When it was taken?

Hon. Clifford O'Sullivan: Yes.

Mr. Brand: No, it was offered solely in connection with the hearing on the application for restraining order.

Hon. Clifford O'Sullivan: Then, what you are saying now, you would like to offer it to supplement the record made before the ICC.

Mr. Brand: That is right. It amplifies and illustrates. [fol. 219] Hon. Clifford O'Sullivan: Then are we going to review the hearing on this occasion?

Mr. Brand: No. That is all we intend to offer, is the transcript of the testimony of Crotty and the exhibits that were introduced in evidence, the contracts that Judge Thornton has.

Hon. Clifford O'Sullivan: To conclude the matter, let me make this suggestion: you have made the offer.

Mr. Brand: That is right.

Hon. Clifford O'Sullivan: At least tentatively we do not rule on it. We will consider it. This is something that is presented now for the first time.

Mr. Brand: Yes, sir.

Hon. Clifford O'Sullivan: If we conclude that it is proper for us to give any attention to the testimony offered before Judge Thornton, we will advise the respondents and give them, which I think would be only fair, the right to meet any part of that testimony by their evidence.

I fear it might lead, indeed, to a retrial of the whole thing, but that is the way we will leave it, if that is agreeable.

[fol. 220] Mr. Brand: Excepting that, your Honor, may we hand to the Court—not necessarily at this moment—the memorandum we have prepared supplementing the two pages we prepared referring to the Idaho case, in which we point out where in the record Mr. Crotty's testimony is amplifying and illustrative. We could serve those on counsel and hand them to the Court later.

Hon. Clifford O'Sullivan: You can file them.

(Documents were thereupon handed to the Court.)

Hon. Clifford O'Sullivan: I will say, even without getting around to the point of whether we are going to consider that, if you feel the presentation of this agenda calls for some reply by you, you may file a reply also within such time as we will determine after we have determined whether we will consider this question.

So, let us proceed, then.

Mr. Mahoney.

Mr. Mahoney: Thank you, your Honor.

I think perhaps I should take care of a preliminary matter. On Page 44 of my brief there is what I think is a vital typographical error. The word "not" should be "now." I say, "It would not seem to be clear," and I meant to say, "It would now seem to be clear."

Hon. Thomas P. Thornton: What is the page?

[fol. 221] Mr. Mahoney: Page 44, the fourth line from the top.

Hon. Clifford O'Sullivan: That is Page 44 in the second sentence of the first full paragraph; is that right?

Mr. Mahoney: Yes, sir.

Hon. Clifford O'Sullivan: "It would not seem to be clear" should be "It would now seem to be clear."

Mr. Mahoney: That is right, your Honor.

Hon. Clifford O'Sullivan: All right.

ARGUMENT BY MR. MAHONEY ON BEHALF OF PLAINTIFF

Mr. Mahoney: The Complaint in this case was filed by the Brotherhood of Maintenance of Way Employes and joined in by the Railway Labor Executives Association, which, incidentally, is an association composed of the chief executive officers of all the standard railroad labor unions of the United States, because the Interstate Commerce Commission had failed to obey the requirements of Section 5 (2) (f) when it approved the merger of the Erie and Delaware, Lackawanna & Western Company.

Section 5 (2) (f) requires the Interstate Commerce Commission, in approving transactions under Section 5 (2), which is the merger provision, to provide that no employee shall be placed in a worse position with respect to his employment for a period of four years following the merger unless—to answer Mr. Rohr—unless his em-[fol. 222] ployment with the railroad is less than four years, and then he is protected an equivalent time.

Hon. Clifford O'Sullivan: You made your position clear, that your contention is that those employes who have been with the railroad less than four years prior to the effective date shall have what you call their jobs frozen for not less than the period of time that they were employed prior to the effective date.

Is that your position?

Mr. Mahoney: Yes, your Honor. Perhaps it is semantics, but I really don't believe it can be called "job freeze." They do not freeze the jobs; they freeze the employment situation.

The jobs can be changed and employes may have to move. They may get other jobs. But they have to be comparable jobs at comparable wages. The jobs are not necessarily frozen.

That is our position.

* * * * * * *

[fol. 223]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Served March 30, 1960

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D. C., and served on all other parties in interest within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of such exceptions. At the expiration of said period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions have been seasonably filed or the order has been stayed or postponed by the Commission. If exceptions are filed, replies to exceptions may be filed within 20 days after the final date for filing of exceptions. It should not be assumed that the recommended order has become effective as the order of the Commission until a notice to that effect, signed by the Secretary, has been served.

FINANCE DOCKET NO. 20707

ERIE RAILROAD COMPANY—MERGER, ETC.—DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY

Decided .....

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1. Motion of the dissenting stockholders to reconvene the hearing to permit conclusion of cross examination and presentation of evidence if desired, overruled.

2. (a) Merger of the properties and franchises of The Delaware, Lackawanna and Western Railroad Company into the Erie Railroad Company for ownership, management, and operation, (b) acquisition by the latter of sole or joint control through ownership of stock of railroad carriers subsidiary to or affiliated with the former, and (c) acquisition of trackage

rights by the Erie Railroad Company, as successor in interest, over the line of the Pennsylvania Railroad now jointly used by The Delaware, Lackawanna and Western Railroad Company, approved and authorized, subject to conditions.

3. Authority granted to Erie Railroad Company to issue certain shares of Erie-Lackawanna Railroad Company common stock without par value in conversion of outstanding capital stock of the Erie Railroad Company and The Delaware, Lackawanna and Western Railroad Company, including certain restricted stock options of the latter; and to assume obligations and liabilities of The Delaware, Lackawanna and Western Railroad Company under its outstanding mortgage bonds and certain of its other securities; all in connection with the proposed merger, and subject to certain conditions.

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[fol. 224]

REPORT AND ORDER RECOMMENDED BY HYMAN J. BLOND, HEARING EXAMINER

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[fol. 225]

EMPLOYEE CONSIDERATION

Estimated effect upon employees. The average number of the employees comprising the total staffs of the applicants, based upon counts made each month during 1956, 1957, and 1958, in order, are shown as follows:

	1956	1957	1958
Erie	18,134	17,245	15,021
Lackawanna	9,969	9,273	7,981

Consolidation of the applicant's work forces upon the merger becoming effective would entail a reduction in the total number of employees, and dislocation and rearrangement of the place of employment of many of the remaining employees. The seniority rosters of Erie and Lackawanna would be merged into single lists of employees headquartered at the various points involved. On the basis of the 1956 employment figures, available when study was pre-

pared, the unified company would have 28,103 employees at the time of merger. Estimated totals pertaining to the employment situation at the end of each of the first 5 years of unified operation, are shown as follows:

[fol. 226]

	Year After Merger					
	1st	*2nd*	*3rd*	*4th*	*5th*	*Total*
Total employees	27,689	26,854	26,533	26,157	26,069	
Jobs abolished	403	818	484	190	87	1,982
Re-employable locally	189	384	227	89	41	[illegible]
Jobs transferred	430	958	481	191	99	2,[illegible]
Deprived of employment	172	383	192	76	40	863
Created by attrition	2,507	2,440	2,402	2,387	2,380	12,116
Attrition jobs unused	2,318	2,056	2,175	2,298	2,339	11,186

Divided according to the general class of employees in groups as reported to this Commission, the 1,982 job abolishments would affect totals of, executive 76, clerical 636, maintenance of ways and structures 184, maintenance of equipment and stores departments 396, miscellaneous transportation 245, transportation yard employees other than yard crews 29, yard crews—engineers 51, firemen 51, conductors 51, brakemen 101, and train crews—engineers 31, firemen 31, conductors 27, brakemen 79, and 3 extra-board men.

The probable cost of affording job protection rights to the employees who would be affected adversely as a direct result of the merger, reflected in the Wyer report shows increased annual costs of $505,133 chargeable to wages and rules adjustments necessary to equalize those which differ as to Erie and Lackawanna employees, and $74,597 chargeable to non-recurring payments equivalent to 5 percent interest on the cost of payments to the affected employees; plus additional cash requirement, of $3,108,187 chargeable to operating expenses with accompanying Federal income tax benefits of 52 percent, making total net cash required, $1,491,930. Study XIV, which supports the foregoing estimates assumes that approval of the merger would be made subject to the same conditions as those prescribed in *New Orleans Passenger Terminal Case*, 282 I.C.C. 271, (New Orleans case) which the applicants contend should be imposed in the proceeding herein. The cited case provides for application of the terms of the so-called Washington Job

Protection Agreement of May 21, 1936, subject to limitations defined in certain of the conditions included in *Oklahoma Ry. Co. Trustees, Abandonment*, 257 I.C.C. 177.

Employment records of the applicants for 1954, 1955, and 1956 were analyzed to determine the normal annual attrition due to deaths, retirements, dismissals, and resignations. Because most resignations involve junior employees, the applicants estimate that only between 40 percent and 60 percent of the jobs created by attrition within the 5 maintenance and transportation employee groups, and 80 percent of the professional, clerical, and general groups of jobs would be available for filling by employees whose jobs would be abolished; that all the executive and officials positions would be so available; that displaced employees at locations where substantial forces were located would [fol. 227] be re-employed locally; and that other displaced employees would be offered transfers to locations where jobs created by attrition would be available. Components of the total costs and net cash requirements shown include the expected costs to the unified company to provide displacement allowances for persons placed in a worse position; coordination allowances for persons deprived of employment; separation allowances payable in lump-sum settlements; moving allowances payable to affected employees who accept employment at other locations; and allowances for losses incurred by employees obliged to sell their homes and move to other locations. Wyer and the applicants assert that the interpretations of the protective conditions were applied to achieve a conservative result and that if there are discrepancies, they reflect overstatements of what the cost would be to the unified company.

Requests for additional labor protective conditions. An officer of the Railroad Marine Union requested the imposition of conditions to assure severance payments and job protection to the affected employees. The railway Labor Executive's Association opposes the merger as not consistent with the public interest in view of the predicated adverse effect upon more than 4,000 employees of the applicants, and the disadvantages alleged by the other interveners.

The labor association's brief is devoted to arguing that section 5(2)(f)[10] of the act requires the prescribing of labor protective conditions adequate to assure the "employment" of all adversely affected employees for a minimum of 4 years after the effective date of the merger, rather than the providing of "compensation" in lieu of the employment. Accepting statements of proponents of the merger which indicate that the proceeding herein will prove to be a landmark in the field of railroad development which other railroads contemplating future mergers would accept and follow as a pattern, the labor association contends that since [fol. 228] enactment of the aforesaid labor provision as part of the 1940 amendment to the Interstate Commerce Act, the instant proceeding is the first major case of precisely the type of merger transaction which the Congress intended to regulate. Therefore it asserts that extreme care should be taken to insure complete compliance with the mandate of section 5(2)(f), in the event the merger proposed herein is approved by the Commission. It asserts that the issue was not determined in the recent approval of the merger of the Norfolk & Western Railway Company and the Virginian Railway Company inasmuch as the railroads and representatives of the employees had reached an

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[10] Section 5(2)(f). As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. *In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment*, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter, and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees. (Emphasis supplied.)

agreement which satisfied the requirements of section 5(2)(f).

Supporting the argument that the second section of the aforesaid law is explicit in requiring that the employment status of every employee be preserved for a period of 4 years after the date of the Commission's order of approval, the labor association cites the decision of the Supreme Court in *Railway Labor Executive's Association* v. *United States*, 339 U. S. 142 (rehearing denied), in which it considered the effective period for the application of labor protection prescribed by the Commission in its initial decision in the New Orleans case, 267 I.C.C. 763. The legislative history of section 5(2)(f) considerations before the House of Representatives and the Senate and their respective committees and conference committees, is outlined in detail to demonstrate that the employees must not be adversely affected for a minimum of 4 years. As the Commission's decision on further hearing of the New Orleans case, following the Supreme Court decision, gives full cognizance to the intent of the enactment pertaining to the minimum period of protection, further discussion herein on that point is not necessary. The other proposition allegedly intended in the second sentence of subparagraph (f), is that the protection envisions an indefinite "employee freeze" by which savings were to be realized through normal attrition. Thereupon, the conclusion is presented that appropriate fair and equitable minimum protection would provide not less than 4-year preservation of employment to every employee of every carrier affected by approval of transactions pursuant to section 5(2) of the act.

The labor association deems the proceeding herein as the ideal one in which to provide protection in the form of preservation of employment without relation to any other protection by way of compensatory benefits, because the applicants estimate that during the first 5 years after merger when employees would be affected, normal attrition would create openings for 600 percent more employees than would be affected by job abolishments; and that appropriate safeguarding of the affected employees of the applicants would probably involve a smaller financial burden than the payments estimated in Study XVI, under the provisions

of the New Orleans conditions. Included with the labor association's brief are conditions which it suggests should be imposed for a period of not less than 4 years, in the form (except for changes in the railroads' names) introduced [fol. 229] in evidence in the Norfolk & Western merger proceeding, to which the Commission referred in approving the application therein. Those conditions are reproduced and attached hereto as appendix "F".

Employee protective conditions the same as those prescribed in *New Orleans Passenger Terminal Case, supra*, would fully comply with the statutory standards requiring fair and equitable arrangements to protect the interests of railroad employees affected. Nothing contained in the arguments of the labor association disproves the adequacy of such conditions in terms of employment or compensation, which are without significance if not coupled together. It is not necessary to find that the conditions stipulated in the Norfolk & Western merger case would be fair and equitable, although nothing herein prohibits the applicants and the employee organizations from agreeing upon the provisions of those conditions. Nor should there be any presumption that if the parties had willingly agreed to the Norfolk & Western conditions, such would be found fair and equitable for purposes of being imposed as conditions in view of the circumstances pertaining to the proposed merger. See *Florida East Coast Ry. Co. Reorganization*, 307 I.C.C. 5. The New Orleans conditions will be included in the certificate and order recommended herein.

[fol. 229a]

APPENDIX "F" TO REPORT

F. D. No. 20707

Suggested Employee Protective Conditions

A fair and equitable arrangement for the protection of the interests of the employees adversely affected herein and one which will not result in employees of the Erie Railroad Company and the Delaware Lackawanna and Western Railroad Company being placed in a worse position with respect to their employment for a period of four years, will

be provided by applying the same conditions imposed in the *New Orleans Union Passenger Terminal* case, F. D. No. 15920 (New Orleans Conditions), for the protection of all employees of both the Erie and the Lackawanna who may be adversely affected with respect to their rates of pay, rules, or working conditions, or rights or privileges pertaining thereto, upon approval and effectuation of the proposed merger and related transactions, and in addition thereto the following:

(a) On the effective date of the proposed merger, the Erie-Lackawanna will take into its employment all employees of the Erie Railroad Company and the Delaware Lackawanna and Western Railroad Company who are willing to accept such employment, and none of the present employees of either of said carriers shall be deprived of employment or placed in a worse position with respect to their employment or compensation due therefor for a period of four years from this Commission's order of approval herein, because of the merger of the said railroads or any program of economies undertaken as a result thereof;

(b) Section 13 of the Washington Agreement and Condition No. 8 of the "Oklahoma Conditions" as found in the "New Orleans Conditions" shall not be applicable and the following provision shall apply:

"In the event any dispute or controversy arises with respect to the protection afforded by these conditions or by the New Orleans Conditions (Except as defined in Section 11 of the Washington Agreement and Condition 9(d) of the Oklahoma Conditions) or in connection with any agreement entered into between the carrier parties hereto and the representatives of their employees relating to the said merger and related transactions, as provided by the New Orleans Conditions, including an interpretation, application, or enforcement of any of the provisions of said agreements, which cannot be settled by the carrier or carriers and the employee or his authorized representative within 30 days after the dispute arises, it may be referred by either party to an arbitration committee for considera-

tion and determination. Upon notice in writing served by one party on the other of intent by that party to refer the disputed controversy to an arbitration committee, each party shall within 10 days, select one member of the arbitration committee and the two members thus chosen shall select a third member who shall serve as chairman. Should the two members be unable to [fol. 229b] agree upon the appointment of the third member within 10 days, either party may request the National Mediation Board to appoint the third member. The decision of the majority of the arbitration committee shall be final and conclusive. The salaries and expenses of the third member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them."

It should be the intent and effect of the foregoing conditions that all employees adversely affected by the merger prior to a date four years from the effective date of the order of approval are to receive as a minimum the protection afforded by the second sentence of Section 5(2)(f), namely, complete preservation of employment for four years, but if the total amount received by affected employees who are benefited by that sentence is less than they would have received under the New Orleans Conditions, applied from the date of adverse effect to them, then they are entitled to the remaining benefits which they would have received under the latter. Should the amount of compensation which an employee receives by virtue of the protection afforded under the second sentence of Section 5(2)(f), equal or exceed the amount to which he would have been entitled to under the New Orleans Conditions, then he shall receive nothing under the latter.

[fol. 230]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Transcript of Argument in Finance Docket No. 20707

* * * * * * * *

ARGUMENT OF WILLIAM G. MAHONEY

Mr. Mahoney: Thank you, Mr. Chairman.

May it please the Commission, my name is William G. Mahoney, and I represent the Railway Labor Executives Association in this proceeding.

I have asked that an outline of the argument which I am going to attempt to present here be distributed because of its length and the limited time that I have. I couldn't possibly cover the—I couldn't possibly describe this issue as it deserves and also rebut the other side in 30 minutes, so I have taken the liberty of asking that this be distributed, [fol. 231] together with the brief which I prepared and submitted to the Examiner, and which was attached to my Exceptions as Exhibit A, because the outline refers to the brief page references.

This issue which is raised in this proceeding for the first time is the most important issue which this Commission has decided involving railroad employees in at least ten years.

The reason it is raised at this time is because of the onslaught, literal onslaught of merger cases, giant merger cases, which, if approved, will cut railroad employment in the United States by perhaps more than 25 per cent.

It was never raised before because there has never been a serious threat to over-all railroad employment since the passage of the 1940 Transportation Act.

The issue which is presented to the Commission in this proceeding is a very simple issue. It involves the second sentence of Section 5(2)(f). The issue is whether that sentence means what it very plainly says.

The second sentence of Section 5(2)(f) is set forth on page 1 of the outline, and the key clause in that second sentence is underlined and says, "will not result in employees . . . being in a worse position with respect to their employment." The key word in that clause is "employment". And we are here to determine what did Congress mean when it said "employment". Did it really mean "employment" as

everyone understands it, or did it mean something else? [fol. 232] Did it mean "compensation", "compensation in lieu of employment"?

It is the contention of the Railway Labor Executives Association, speaking for the hundreds of thousands of railroad employees who were intended to be protected by this very carefully and deliberately worded legislation and whose livelihoods are now jeopardized by this tidal wave of gigantic railroad mergers that this word in this clause of this sentence means exactly what it says, it means "employment."

Now, if it were applied as meaning "employment" literally, as it says, would that create any greater burden on the railroads, on these railroads particularly in this case, than the compensatory conditions?

We say it wouldn't. I say, as a matter of fact, that Mr. Cummings just admitted that it wouldn't. He said that the only employees who would be deprived of employment as a result of this merger would be those who refused to transfer, and that I took the position in a conversation with him just prior to the argument, that men who were compelled to transfer but who were not placed in a worse position with regard to their employment as a result of that transfer, would be considered protected under employment protection.

So if the only people are those, the only people who are protected here, to be considered as deprived of employment are those who refuse to transfer, and under an employment protective condition they would have to transfer, then the [fol. 233] railroad couldn't be hurt at all by the imposition of this. As a matter of fact, when they might well be helped.

The turnover in this employment, as is clear from the exhibits, especially Exhibit H-48 of the Applicants, shows that the turnover will be 600 per cent more than the number of jobs abolished. It will be 600 per cent more, over 12,000 jobs created by attrition as compared with almost 2,000 abolished in the period of five years following the merger.

Now, there may still be a few employees, very few—there doesn't appear to be from what Mr. Cumings says—but there may be a few employees carried, so to speak, for a short while. But it certainly couldn't be many in view of this tremendous turnover.

Furthermore, under the compensatory benefits, junior employees—the effect takes place from the bottom of the seniority roster—junior employees are laid off and are paid four years' protection. Under employment benefits, no one is laid off and the protection takes place from the top, and as the man dies, retires, resigns, or what happens, no protection is paid to the employee, it ceases.

So in very many cases it will cease in the first year or the second year, and this employment protection may well cost the applicant less than the compensation protection.

Now, to get to the statute itself, Section 5(2)(f). There are, of course, three ways of determining just what this [fol. 234] statute requires. We all agree, I think, that it does require something. It commands this Commission to do something in approving a merger. We can determine this in the language of the provision, from its legislative history, and from interpretation of that statute.

Now, with regard to interpretation, I would like to say this at the outset. The Interstate Commerce Commission has never considered this statute against the background of this issue, and, therefore, has never determined that this provision requires only compensatory benefits.

The language of the provision itself, with which we are concerned, is the first two sentences, the first one which requires a fair and equitable arrangement for employees, and the second, which requires that no employee shall be placed in a worse position with respect to his employment for four years from the date of the merger, or, depending upon his length of service, whichever is less.

This is the controlling provision, and what does it mean? Does it mean only compensation without performance of service therefor, or does it mean something else?

On page 3 of the outline there are cited a number of Supreme Court decisions involving fundamental rules and statutory construction on this point. I would like to read just one. It is from the United States against the First National Bank: "The natural and usual signification of [fol. 235] plain terms is to be adopted as the legislative meaning in a statute in the absence of clear showing that something else was meant."

And what is the clear showing that something else was meant?

There is none.

"Employment" means compensation and service. It has to. If someone is employed he isn't just paid, he works.

Now, if the Congress—perhaps the Congress, you might say, didn't know how to use a proper term in this context, but I say that they did because they were very familiar with the terms of the Washington agreement during consideration of this provision. It was analyzed, it was discussed, it was bisected and dissected, and it was gone over and over and up and down. And the terms of the Washington condition could have been used to very easily and irrefutably provide only worse position with respect to compensation, because Section 6 of that agreement says no employee shall be placed in a worse position with respect to compensation.

But Congress chose "employment."

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[fol. 236] I agree that in a case last year, two months ago, that if this issue wasn't raised that we can't now go back. It was waived for the purpose of a particular case. But once this issue is raised, then it is, it must be decided. It has not been waived.

Commr. Walrath: Mr. Mahoney, that is the point that I was hoping you might cover, whether or not your concern is that the effect of, you might say, the normal conditions that we have been imposing on this particular merger or whether it is for the future, in mergers that you anticipate.

With this ratio of attrition, it would seem on the face of things that there will be no actual loss of jobs.

Now, is that not true?

Mr. Mahoney: No. The Applicants feel, in their conjecture and their guesstimate as to what this will do, that no employees will be deprived of their jobs if they will transfer, but 863 of them, they guess, will not transfer, they will be deprived of their jobs. Under an employment protective setup, I say that they wouldn't, they would have to transfer if the jobs were jobs of the same type and the conditions were the same or comparable conditions, and the pay was the same. Then I think they would have to transfer.

So that there would be, in this case, no reason at all for [fol. 237] these employment benefits to cost the railroad certainly any more than the compensatory benefits.

Commr. Walrath: On the face of things, it looks like this would work without injury either to the brotherhoods or to the carriers—

Mr. Mahoney: That's right.

Commr. Walrath: —if we should approve that basis.

Mr. Mahoney: And it would have a tremendous effect on the employment in the railroad industry because they would know that, regardless of these things happening, they weren't going to lop off a lot of jobs at the bottom, these fellows would all be bumped out, but this is going to take place a little more gradually. In many cases, like in this, it is going to take place very fast because the attrition rate is so fast.

Commr. Walrath: Now that I have interrupted you, let me ask for information, isn't it customary in the industry that the railroads would prefer to hire the experienced people and not get rid of somebody and go out and get somebody who knew nothing about it?

Mr. Mahoney: I would think so, yes.

Commr. Walrath: So that there is a mutuality of interest there, I would say, on the face of it.

Mr. Mahoney: I would say yes. As I say, it seems to us it would be to the benefit of both in a situation, certainly a situation like this. And we feel that this is actually what [fol. 238] is required, and we are bringing it now to issue because of the tremendous cut that will come in employment through these major mergers.

Now, this is not, as is claimed by the other side, a violation of the national transportation policy, because 5(2)(f) is written into the national transportation policy. The national transportation policy, as it now exists, was passed along with the Transportation Act of 1940, and 5(2)(f) was a part of that. And, as a matter of fact, the policy states that one of its ends is the establishment of equitable working conditions and an economical arrangement for transportation.

Now, they cite the Great Northern Railway Company Discontinuance case, where it says you cannot keep jobs for employees who aren't needed, and so forth. Well, that case is inapposite here since it involved an abandonment of service, and if you will look on page 5 of this outline, you will see that abandonment of service was expressly ex-

cluded by the Congress from preservation of employment—the preservation of employment provisions that are found in 5(2)(f).

In conclusion, we respectfully submit that the plain language of Section 5(2)(f), its unequivocally and unusually clear legislative history, and its interpretation by the United States Supreme Court require the Commission to preserve the employment of all employees who would be [fol. 239] affected by a transaction under Section 5(2) for a period of at least four years from the date of the Commission's order of approval.

* * * * * * *

[fol. 240] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 20575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, Plaintiff,

—and—

RAILWAY LABOR EXECUTIVES ASSOCIATION,
Intervener Plaintiff,

—v.—

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, Defendants,

—and—

ERIE-LACKAWANNA RAILROAD COMPANY,
Intervener Defendant.

OPINION—December 7, 1960

Before: O'SULLIVAN, Circuit Judge, LEVIN, Chief District Judge, and THORNTON, District Judge.

THORNTON, District Judge: A statutory three-judge court was convened pursuant to 28 U.S.C.A. §§1336, 1398, 2284

and 2321-25, to hear and determine the issue presented by the complaint here filed. This Court is asked to enjoin and set aside an order of the Interstate Commerce Commission (hereinafter also referred to as either the Commission or the ICC), dated September 13, 1960 and effective October 17, 1960, approving the merger of the Erie Railroad Company and the Delaware, Lackawanna and Western Railroad Company. The argument upon which the relief sought is premised is single in its thrust. The issue for determination is a narrow one. The order of the Commission which is being attacked contains certain provisions pursuant to 49 U.S.C.A. §5(2)(f) of the Interstate Commerce Act (also known as the Transportation Act of 1940). It is with the interpretation of 49 U.S.C.A. 5(2)(f), hereinafter referred to as 5(2)(f) that we are concerned. We here quote 5(2)(f), [fol. 241] underlining the words which are the crux of this controversy:

> "As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

The sole question presented is whether this provision requires the Interstate Commerce Commission to impose as a minimum upon every transaction approved by the Commission under Section 5(2) the condition that every employee affected must be retained in an *employment status* for a period equal in time to his service with the railroad carrier, not to exceed four years. The Commissioner, in its order of September 13, 1960, prescribed the so-called "New Orleans Conditions" which grant employees compensatory protection in the event of displacement or discharge.

We should perhaps here state that the merger has in fact gone ahead as per the effective date of the order with the exception of those terms which were imposed to comply with the provisions of 5(2)(f). The status of the employees of the merging railroads has not been disturbed pending [fol. 242] this Court's decision. Such procedure was agreed upon by the respective parties at the time of the hearing on the motion for a temporary restraining order which was noticed for hearing, and held, shortly prior to the effective date of the Commission's order. The merged railroad, now the Erie-Lackawanna Railroad Company, has since become an intervening defendant by virtue of substitution for the two railroads.

To aid us in arriving at a proper conclusion the parties have submitted briefs, copies of reports relative to the proposed merger, copies of Congressional Committee reports and of pertinent sections of Congressional debates, copies of agreements (to protect employees) heretofore incorporated in prior railroad merger or combination proceedings, and copies of the proceedings before the Commission. The "New Orleans Conditions", above referred to and contained in the order of the Commission approving the merger, were compensatory protective conditions which were prescribed in ICC orders entered in railroad merger proceedings involving parties different from those here, such proceedings having taken place in New Orleans. The "New Orleans Conditions" do not embrace continued employment. We do not deem it important to our decision that these conditions be set forth here. It is plaintiffs' contention that *anything* short of actual continued employment is violative of the language and intendment of 5(2)(f) with

respect to the phrase therein "being in a worse position with respect to their employment." Section 5(2)(f) requires protective conditions which are to be continued for a period of four years[1] for employees of the merging carriers. This is agreed. But the interpretation of the extent [fol. 243] of such benefits and of the mandate of 5(2)(f) is presented to us in two sharply contrasting outlines.

We believe it to be without dispute that this is the first instance since the 1940 enactment of 5(2)(f) that there has been an attempt to get judicial (or ICC, for that matter) recognition of the construction now placed by plaintiffs on 5(2)(f). In no case that has been called to the Court's attention has the construction urged by plaintiffs been placed on this Section. In no case has the proposition advanced here been previously advanced. In the numerous cases that have come before the ICC where 5(2)(f) conditions were required to be met, they were considered to have been met by various compensatory plans, continued employment not being one of them. From our reading of 5(2)(f) we are unable to find a clear expression, as plaintiffs contend, that continued employment of affected employees is required to be imposed. We believe that ordinary every-day logical reading of 5(2)(f) mitigates against plaintiffs' contention. The phrase here in issue, "in a worse position with respect to their employment" is couched in such general language as to hardly be susceptible of being interpreted as requiring any specific condition, much less that of guaranteed employment. It would appear to have been a simple matter to have incorporated the concept of continued employment in this sentence, had such been the intention of Congress. The plaintiffs' contention that the language "in a worse position with respect to their employment", being broader in scope than language granting "compensation", is that employees are required to be retained in an employment status following a merger. We do not agree that this language should be so construed. Congress could have used language clearly stating that the railroads may not discharge affected employees. Congress did precisely that in [fol. 244] the Emergency Railroad Transportation Act of

[1] This is modified with respect to employees in the service of the railroad less than four years.

1933, 48 Stat. 211, and the Communications Act of 1943, 47 U.S.C.A. 222(f). It is our observation, therefore, that insofar as the plain language of 5(2)(f) is concerned, a literal approach giving effect to each phrase therein, necessitates denying the construction contended for by plaintiffs. This is to say that we do not consider that there is ambiguity within the structure of 5(2)(f). Under ordinary rules of statutory construction we would be precluded from pursuing any further line of inquiry. However, both parties to this cause claim support for their respective contentions in the legislative and operational history of the Act. We therefore review such history.

First, as the Act was originally proposed and adopted, it did not contain the specific language which is before us. As then proposed it clearly would not have called for job security or "job freeze" as a condition to authorizing a merger of railroads. It is clear also that Representative Harrington of Iowa sought to have an amendment adopted to the proposed Act which would provide that no employee should be displaced or his job impaired by a railroad merger. It appears that, as originally proposed, the so-called "Harrington Amendment" would have required such conditions to be imposed. From the offering of this amendment until the Act was finally adopted, the issue of whether or not "job freeze" should be a condition of any merger, was clearly and distinctly before the members of Congress. Whether such condition should be followed was discussed, pro and con, during the time this legislation was considered. The Harrington Amendment as originally proposed provided:

> "No such transaction shall be approved by the Commission if such transaction shall result in *unemployment or displacement of employees of the carrier or carriers*, or in the impairment of existing employment [fol. 245] rights of said employees."[2] (Emphasis supplied.)

Such amendment was not adopted into law, nor does the Act as it exists contain any language which might be said

[2] 84 Cong. Rec. 9882 (1939).

to be equivalent to what Mr. Harrington proposed. It is clear that the members of Congress knew what the Harrington Amendment sought to accomplish and refused to include that language or its equivalent.

Second, at the time of, and following, the enactment of the Section now before us, representatives of the plaintiffs in this cause gave public expression to, and understanding of, what was accomplished by the Section before us, and clearly asserted that it was their understanding that protection was to be afforded by way of compensation to such employees as would lose their jobs or be displaced as a consequence of a merger.[3]

Third, the application and construction of the Section have been before the ICC in many cases during the twenty years since the enactment of the Transportation Act of 1940. Consistently and clearly, the ICC has interpreted the particular language in the same manner as it now contends it should be construed. It is true that the issue now made by plaintiffs in this case was not presented to, nor passed upon, by the ICC in any of the cases adjudicated in the preceding twenty years. Neither, however, did these plaintiffs, as representatives of the employees involved, there make the contention that is being made in the instant proceeding. The ICC in its 1941 report referred to 5(2)(f) [fol. 246] as granting only compensatory benefits. Such a contemporaneous administrative construction of a statute is entitled to great weight and indeed the Commission has never deviated from that interpretation. The plaintiffs contend that they have never challenged the Commission's interpretation because only in recent years have wholesale mergers occurred in the railroad industry with the resultant effect of a reduction in employment opportunities. How-

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[3] See Brotherhood of Maintenance of Way Employes' *Journal*, volume XLIX, pages 13 and 14 (October 1940); *The Railway Conductor*, volume 57, page 308 (October 1940); *Locomotive Engineers' Journal*, page 725 (October 1940); Brotherhood of Locomotive Firemen and Enginemen's *Magazine*, page 223 (October 1940); *Railway Clerk, Official Journal of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees*, pages 467 and 488.

ever, in at least one prior large-scale merger compensatory relief was afforded employees.[4]

Fourth, it is clear also that since 1940 the United States Congress has been aware of the construction placed upon the Act by those interested in its interpretation and enforcement. It has not seen fit to indicate by any attempted clarification of the Act its disagreement with the construction uniformly placed upon it in the intervening years.

Two decisions of the Supreme Court which have been cited and argued by all parties to this controversy in support of their respective positions should be mentioned. This Court, however, deems both decisions inapposite to the issue here. In Railway Executives Association v. United States, 339 U.S. 142 (1950), the Supreme Court held that the four-year limitation in 5(2)(f) provided only a minimum period of protection for employees and that the first sentence of 5(2)(f) still required the Commission to arrange a fair and equitable solution and protect the interests of the railroad employees. In Order of Railroad Telegraphers v. Chicago & North Western Railway Co., 362 U.S. 330 (1960), the sole question was whether a strike arising out of the [fol. 247] railroad carriers' refusal to negotiate an agreement with a union that would prevent the railroad from abolishing any position was a "labor dispute" within the meaning of the Norris-LaGuardia Act. It is interesting to note that in this decision Mr. Justice Whittaker, writing for the four dissenting justices, specifically stated at pages 355 and 357 that, under 5(2)(f) of the Act, the Commission had no authority to "freeze existing jobs". The majority opinion, however, never reached this question.

One additional observation may be in order. The decision of this Court that 5(2)(f) provides only compensatory benefits is supported by the general policy of the ICC which is to promote "safe, adequate, and efficient service and foster sound economic conditions in transportation." A requirement that carriers retain employees following mergers would sterilize provisions of the Act which is designed to promote economy partially through the reduction of per-

[4] The Louisville and Nashville Railroad Company Merger, 295 ICC 457 (1957), affirmed City of Nashville, Tennessee v. United States, 155 F.Supp. 98 (M.D. Tenn. 1957) affirmed 355 U.S. 63 (1957).

sonnel. It seems to us that if Congress had intended such a result it could have, and would have, said so in unequivocal language.

The temporary restraining order will be set aside and the complaint dismissed. An order in accordance with the foregoing may be presented.

Clifford O'Sullivan, Circuit Judge, Theodore Levin, Chief Judge, United States District Court, Thomas P. Thornton, United States District Judge.

Dated at Detroit, Michigan; this 7 day of December, 1960.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 248] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

Civil Action No. 20575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
Plaintiff,

—and—

RAILWAY LABOR EXECUTIVES ASSOCIATION,
Intervener Plaintiff,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants,

—and—

ERIE-LACKAWANNA RAILROAD COMPANY,
Intervener Defendant.

ORDER

At a session of said Court held in the Federal Building, City of Detroit, Wayne County, Michigan, on the 19th day of December, 1960.

ORDER DENYING PLAINTIFF'S REQUEST FOR INJUNCTIVE RELIEF, DISMISSING COMPLAINT AND SETTING ASIDE TEMPORARY RESTRAINING ORDER—December 19, 1960

This cause having been briefed and argued on the merits by counsel for the respective parties and having been fully submitted at the close of hearing on November 15, 1960, and

This Court, after due consideration, having rendered its decision and stated the grounds therefor in its Opinion dated and filed December 7, 1960,

Now, Therefore, in conformity with said Opinion,

It Is Hereby Ordered That:

1. Plaintiffs' request for injunctive relief be and here-
[fol. 249] by is denied and the above-entitled action and the Complaint therein be and they hereby are dismissed with prejudice to Plaintiffs.

2. The temporary restraining order entered October 14, 1960 be and hereby is set aside and rendered null, void and of no effect.

Clifford O'Sullivan, Circuit Judge.
Theodore Levin, Chief Judge, United States District Court.
Thomas P. Thornton, United States District Judge.

[fol. 250] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

Civil Action No. 20575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES and RAILWAY LABOR EXECUTIVES' ASSOCIATION, Intervenor, Plaintiffs,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and ERIE-LACKAWANNA RAILROAD COMPANY, Intervenor, Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed January 9, 1961

I

Notice is hereby given that the Brotherhood of Maintenance of Way Employes, plaintiff, and the Railway Labor Executives' Association, intervenor-plaintiff, in the above-entitled action, hereby appeal to the Supreme Court of the United States from the final order dated and entered in this action on December 19, 1960, dismissing the complaint and action.

This appeal is taken pursuant to 28 U.S.C.A. §1253.

II

The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. The complaint and appendices thereto filed in the above-entitled action on October 7, 1960, to suspend, enjoin, annul and set aside an order of the Interstate Commerce Commission.

2. The motion for order authorizing intervenfion filed herein by the Erie Railroad Company and the Delaware, Lackawanna and Western Railroad Company on October 10, 1960.

[fol. 251] 3. The order authorizing intervention of the Erie and DL&W entered on October 10, 1960, by consent.

4. The answer and appendices of defendant railroads dated October 11, 1960.

5. The motion for order authorizing intervention filed by the Railway Labor Executives' Association on October 12, 1960.

6. The order authorizing intervention of the Railway Labor Executives' Association entered October 12, 1960.

7. The transcript of the hearing held before the United States District Court for the Eastern District of Michigan, Honorable Thomas P. Thornton, District Judge, on October 12, 1960, on the issuance of a temporary restraining order.

8. Plaintiffs' Exhibits Nos. 1 through 7 admitted into evidence at the hearing held before Honorable Thomas P. Thornton on October 12, 1960.

9. The motion for substitution and redesignation of intervening party defendants filed October 27, 1960.

10. The order authorizing substitution and redesignation of intervening party defendants entered October 27, 1960, by consent.

11. The amended answer of intervenor defendant Erie-Lackawanna Railroad Company filed October 31, 1960.

12. The joint answer of the defendants United States of America and Interstate Commerce Commission filed herein on November 1, 1960.

13. Stipulation of counsel, dated November 4, 1960, as to portions of Interstate Commerce Commission record to be brought before District Court and waiver of designation.

14. The following portions of the record before the Interstate Commerce Commission, brought before the District Court:

(a) the joint application of the Delaware, Lackawanna and Western Railroad Company and the Erie Railroad Company in Finance Docket No. 20707;

[fol. 252] (b) the returns to questionnaire filed by the Delaware, Lackawanna and Western Railroad Company and Erie Railroad Company in Finance Docket No. 20707;

(c) the petition of the Railway Labor Executives' Association to intervene in Finance Docket No. 20707;

(d) the order permitting the Railway Labor Executives' Association to intervene in Finance Docket No. 20707;

(e) the direct testimony of William Wyer in Finance Docket No. 20707 with respect to the issue raised by the complaint herein, including his statement G and the cross-examination of William Wyer on behalf of Railway Labor Executives' Association, being pages 122-123, 611-635 of the Transcript, in Finance Docket No. 20707;

(f) Wyer's Exhibit H-48.

(g) oral argument in Finance Docket No. 20707 before the full Commission on behalf of the Railway Labor Executives' Association and on behalf of the Erie Railroad Company and the Delaware, Lackawanna and Western Railroad Company, with respect to the issue raised by the complaint herein, being pages 1731-1740, 1771-1792, 1792-1799, 1805-1806, of the Transcript;

(h) Examiner's Proposed Report in Finance Docket No. 20707 served March 30, 1960; and

(i) Report of the Commission and Certificate and Order, dated September 13, 1960, in Finance Docket No. 20707.

15. The transcript of the proceeding held before Honorable Clifford O'Sullivan, Circuit Judge, Honorable Theodore Levin, Chief District Judge, and Honorable Thomas P. Thornton, District Judge, on November 15, 1960.

16. The decision and opinion of the statutory three-judge court dated December 7, 1960.

17. The motion for order preserving the status quo pending appeal to the Supreme Court of the United States dated and filed in this proceeding on December 8, 1960.

[fol. 253] 18. The transcript of the proceeding held before Honorable Clifford O'Sullivan, Circuit Judge, Honorable Theodore Levin, Chief District Judge, and Honorable Thomas P. Thornton, District Judge, on December 19, 1960, on the motion for order preserving the status quo.

19. The order of the statutory three-judge court, denying the motion for order preserving the status quo dated and entered in this proceeding on December 19, 1960.

20. The order of the statutory three-judge court, dated and entered on December 19, 1960, denying a permanent injunction, dismissing the action and the complaint, and setting aside the temporary restraining order on October 14, 1960.

21. This notice of appeal.

III

The following questions are presented by this appeal:

1. Did the Interstate Commerce Commission in its order approving the merger of the Erie and the DL&W violate the requirements of Section 5(2)(f) of the Interstate Commerce Act [49 U.S.C. 5(2)(f)] which section requires a fair and equitable arrangement for the protection of employee interests and as a minimum basis of such arrangement specifies that no employees of railroad carriers affected thereby shall be placed "in a worse position with respect to their employment" for a period of up to four years from the effective date of the Commission's order, depending upon the length of the employees' service, when its order approved the said merger subject to an arrangement which provides partial financial compensation for employees *after* and on specific condition that their position with respect to their employment has been worsened?

2. Are not railroad employees placed in a worse position with respect to their employment by the Commission's approval order herein which contemplates that such employees will be deprived of their employment; that they

will be placed in lower paying less desirable positions; [fol. 254] that they will be forced to exercise their seniority rights and displace fellow junior employees and be displaced by fellow senior employees; that they will be forced to move their families to new places of employment, not once but an indefinite number of times during a five year period following Commission approval until all job abolishments and displacements as a result of the merger have taken place, notwithstanding the fact that such order grants partial financial compensation to such employees after these effects have occurred?

3. Did the Interstate Commerce Commission, and the United States District Court for the Eastern District of Michigan sitting as a statutory three-judge district court in upholding the Commission, misinterpret the plain language of Section 5(2)(f), ignore the intent and purpose of Congress in enacting that provision into law and fail to apply the clear interpretation of that provision as set forth by this Court in its decision in *Railway Labor Executives' Association* v. *United States*, 339 U. S. 142, 70 S.Ct. 530, 94 L. ed. 721, and *The Order of Railroad Telegraphers* v. *The Chicago and North Western Railway Company*, 362 U.S. 330, 80 S.Ct. 761, 4 L. Ed. 2d 774?

4. Does not Section 5(2)(f) require that railroad mergers be approved only upon such terms and conditions as will continue the current employees in equivalent employment for the prescribed period and will permit the economies to be realized at the expense of employees to be achieved only as the current forces are reduced by natural attrition, i.e. as deaths, retirements, resignations, etc. occur?

5. Did not the statutory three-judge court err in refusing to consider the sworn testimony of plaintiffs' witness while accepting and relying upon excerpts from briefs and magazine articles, none of which were part of the record before the Commission or the court?

[fol. 255] George E. Brand, George E. Brand, Jr., William G. Mahoney, Attorneys for Brotherhood of Maintenance of Way Employes and Railway Labor Executives' Association.

[fol. 256] Proof of Service (omitted in printing).

[fol. 258] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

Civil Action No. 20575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES and RAILWAY LABOR EXECUTIVES' ASSOCIATION, Plaintiffs,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and ERIE-LACKAWANNA RAILROAD COMPANY, Defendants.

ORDER DENYING MOTION TO STRIKE ITEMS FROM DESIGNATION OF RECORD ON APPEAL—January 23, 1961

At a session of said Court held in the Federal Building, in the City of Detroit, Michigan, this 23rd day of January, A.D. 1961.

Present Thomas P. Thornton, District Judge.

Upon hearing and consideration of the Motion to Strike Items 7 and 8 from Plaintiffs' Designation of the Record on Appeal and for Certification of the True Record heretofore filed by defendants United States Of America and Interstate Commerce Commission, and it appearing to the Court that said motion should be denied,

It Is Hereby Ordered that the said motion is hereby denied.

Thomas P. Thornton, District Judge.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 264] Clerk's Certificates to foregoing transcript omitted in printing.

[fol. 267]

SUPREME COURT OF THE UNITED STATES

No. 681, October Term, 1960

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, ET AL., Appellants,

vs.

UNITED STATES, ET AL.

Appeal from the United States District Court for the Eastern District of Michigan.

ORDER NOTING PROBABLE JURISDICTION—February 20, 1961

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the motions to advance are granted. The application for a stay of the decree of the three-judge district court insofar as it terminated a temporary restraining order previously granted presented to Mr. Justice Stewart, and by him referred to the Court is granted.